

2-20-2015

## Estate of Cornell Clerk's Record Dckt. 42822

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In the  
**SUPREME COURT**  
of the  
**STATE OF IDAHO**

In the Matter of:

**THE REVOCABLE FAMILY TRUST OF MICHAEL S. CORNELL  
AND ARLIE M. CORNELL.**

Petitioner-Appellant,

Appealed from the District Court of the Second  
Judicial District of the State of Idaho, in and  
for Clearwater County

Honorable MICHAEL J. GRIFFIN, District Judge

Samuel T. Creason  
Attorney for Petitioner-Appellant

Karin Seubert  
Attorney for Respondent-Respondent



In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User	Judge
7/11/2012	NCOC	BARBIE	New Case Filed - Other Claims
		BARBIE	Filing: A - All initial civil case filings of any type not listed in categories B-H, or the other A listings below Paid by: Aherin, Rice & Anegon Receipt number: 0002377 Dated: 7/26/2012 Amount: \$96.00 (Cashiers Check) For: Cronell, John Henry (other party)
	PETN	BARBIE	Petition For Supervised Administration And Removal Of Trustee
	NOHG	BARBIE	Notice Of Hearing
	HRSC	BARBIE	Hearing Scheduled (Hearing Scheduled 08/21/2012 03:30 PM) Petition for Supervised Administration and Removal of Trustee
8/16/2012	APER	BARBIE	Other party: Cronell, John Henry Appearance Darrel W. Aherin
	NOAP	TEMP	Notice Of Appearance
	APER	TEMP	Other party: Johnson, Toni C. Appearance Karin Seubert
		TEMP	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Seubert, Karin (attorney for Johnson, Toni C.) Receipt number: 0002622 Dated: 8/16/2012 Amount: \$66.00 (Cashiers Check) For: Johnson, Toni C. (other party)
	MOTN	TEMP	Motion to Continue and to Set Scheduling Conference
8/17/2012	OBJC	JALLAIN	Objection to Motion to Continue and to set Scheduling Conference
8/21/2012	HRHD	CHRISTY	Hearing result for Hearing Scheduled scheduled on 08/21/2012 03:30 PM: Hearing Held Petition for Supervised Administration and Removal of Trustee
	CMIN	CHRISTY	Hearing result for Hearing Scheduled scheduled on 08/21/2012 03:30 PM: Court Minutes Petition for Supervised Administration and Removal of Trustee
	HRSC	CHRISTY	Hearing Scheduled (Status 10/01/2012 10:00 AM) and Scheduling Conference. All parties must be present for hearing.
8/22/2012	ORDR	BARBIE	Order Continuing Hearing and Setting Scheduling Conference
8/23/2012	AFFD	KBROWNING	Affidavit of Service
9/17/2012	AFFD	BARBIE	Affidavit of Karin Seubert
	MTDM	BARBIE	Motion To Dismiss
	NOHG	BARBIE	Notice Of Hearing

In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User	Judge
9/27/2012	MOTN	KCONNOR	Motion to Vacate Respondent's Notice of Hearing on Motion to Dismiss
	MOTN	KCONNOR	Motion to Strike Affidavit of Karen Seubert
10/1/2012	CONT	KBROWNING	Hearing result for Status scheduled on 10/01/2012 10:00 AM: Hearing Continued and Scheduling Conference. All parties must be present for hearing. (OFF THE RECORD)
10/3/2012	HRSC	KBROWNING	Hearing Scheduled (Hearing Scheduled 11/27/2012 01:00 PM)
		KBROWNING	Notice Of Hearing
10/11/2012	NODT	JALLAIN	Notice Of Deposition Duces Tecum of Toni Johnson
10/12/2012	MOTN	JALLAIN	Motion to Shorten Time
	MOTN	JALLAIN	Motion for Protective Order
10/17/2012	TPMO	JALLAIN	Telephonic Motion Hearing - held 10/17/2012
	CMIN	JALLAIN	Court Minutes
	ORDR	JALLAIN	Order of Protection from Discovery
10/18/2012	RSPN	JALLAIN	Response to Motion for Protective Order
	AFFD	JALLAIN	Affidavit of Darrel W. Aherin
11/1/2012	MEMO	BARBIE	Memorandum Of Law
11/15/2012	RSPN	JALLAIN	Response to Respondent's Motion to Dismiss
	AFFD	JALLAIN	Affidavit of Margaret M Watkins
	AFFD	JALLAIN	Affidavit of Darrel W Aherin
11/20/2012	BREF	BARBIE	Respondent's Reply Brief in Support of Motion to Dismiss
11/27/2012	APER	KBROWNING	Other party: Cornell, Kareen Appearance Theodore O. Creason
	CONT	KBROWNING	Hearing result for Hearing Scheduled scheduled on 11/27/2012 01:00 PM: Continued
	HRSC	KBROWNING	Hearing Scheduled (Hearing Scheduled 01/08/2013 01:00 PM)
		KBROWNING	Notice Of Hearing
	CMIN	BARBIE	Court Minutes
1/8/2013	HRHD	CBAKER	Hearing result for Hearing Scheduled scheduled on 01/08/2013 01:00 PM: Hearing Held
	CMIN	CBAKER	Hearing result for Hearing Scheduled scheduled on 01/08/2013 01:00 PM: Court Minutes
1/11/2013	HRSC	JALLAIN	Hearing Scheduled (Motion to Dismiss Hearing 02/06/2013 02:00 PM)
		JALLAIN	Notice Of Hearing - Briefing schedule: T. O. Creason must submit Brief by 01/23/2013; Reply Briefs due by 02/01/2013

In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User		Judge
1/18/2013	MEMO	CHRISTY	Memorandum RE: Repspondent's Motion to Dismiss	Randall W. Robinson
2/4/2013	MOTN	BARBIE	Motion To Mediate	Randall W. Robinson
	BREF	JALLAIN	Respondent's Brief in Reply to Brief of Surviving Spouse	Randall W. Robinson
2/6/2013	HRHD	JALLAIN	Hearing result for Motion to Dismiss scheduled on 02/06/2013 02:00 PM: Hearing Held	Randall W. Robinson
	CMIN	BARBIE	Court Minutes	Michael J Griffin
2/13/2013	NOTC	JALLAIN	Notice of Service	Randall W. Robinson
	NODT	JALLAIN	Notice Of Taking Deposition of Toni C Johnson	Randall W. Robinson
	MOTN	JALLAIN	Motion for Substitution of Party (IRCP 25(a)(1)	Randall W. Robinson
	NOTH	JALLAIN	Notice Of Hearing for 02/26/2013 at 11:00 AM	Randall W. Robinson
	HRSC	JALLAIN	Hearing Scheduled (Motion 02/26/2013 11:00 AM)	Randall W. Robinson
2/15/2013	MEMO	JALLAIN	Memorandum Opinion	Randall W. Robinson
	JDMT	JALLAIN	Judgment for Dismissal	Randall W. Robinson
2/22/2013	NOHG	BARBIE	Notice Of Hearing	Michael J Griffin
2/26/2013	HRHD	JALLAIN	Hearing result for Motion scheduled on 02/26/2013 11:00 AM: Hearing Held	Randall W. Robinson
	CMIN	JALLAIN	Hearing result for Motion scheduled on 02/26/2013 11:00 AM: Court Minutes	Randall W. Robinson
	MOTN	JALLAIN	Motion for Consolidation (IRCP 42(a))	Randall W. Robinson
	PETN	JALLAIN	Petition by Kareen Cornell as Personal Representative of the Estate of John Henry Cornell & as Surviving Spouse of John Henry Cornell, Deceased Beneficiary of the Revocable Family Trust of Michael S Cornell & Arlie M Cornell for Supervised Administration & Court Ordered Distribution	Randall W. Robinson
3/1/2013	MEMO	JALLAIN	Memorandum of Costs and Attorney Fees	Randall W. Robinson
	AFFD	JALLAIN	Affidavit in Support of Memorandum of Costs and Attorney Fees	Randall W. Robinson
3/4/2013	MOTN	JALLAIN	Motion to Dismiss	Randall W. Robinson
	MOTN	JALLAIN	Motion for Protective Order	Randall W. Robinson
	NOTC	JALLAIN	Notice of Hearing	Randall W. Robinson
	HRSC	JALLAIN	Hearing Scheduled (Motion For Protective Order 03/13/2013 03:00 PM)	Randall W. Robinson
3/11/2013	OBJE	JALLAIN	Objection to Hearing	Randall W. Robinson
3/13/2013	HRHD	CBAKER	Hearing result for Motion For Protective Order scheduled on 03/13/2013 03:00 PM: Hearing Held	Randall W. Robinson

In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User	Judge
3/13/2013	CMIN	CBAKER	Hearing result for Motion For Protective Order scheduled on 03/13/2013 03:00 PM: Court Minutes
3/14/2013	MOTN	JALLAIN	Motion to Disallow Costs and Attorney Fees Claimed by Toni C Johnson against the Trust
3/15/2013	MOTN	CBAKER	Motion To Disallow Costs And Attorney Fees (I.C.R.P. 54(d)(6))
	MEMO	CBAKER	Memorandum In Support
	NOTC	CBAKER	Notice Of Hearing RE: Motion To Disallow Costs And Attorney Fees (I.R.C.P 54(d)(6))
	HRSC	CBAKER	Hearing Scheduled (Motion 04/10/2013 09:00 AM) Motion To Disallow Costs And Attorney Fees
3/20/2013	NOTC	CBAKER	Amended Notice Of Taking Deposition Of Toni C. Johnson
3/26/2013		JALLAIN	Filing: L2 - Appeal, Magistrate Division to District Court Paid by: Aherin, Darrel W. (attorney for Cronell, John Henry) Receipt number: 0001115 Dated: 4/2/2013 Amount: \$61.00 (Cashiers Check) For: Cornell, Michael S. (subject)
	NOTA	JALLAIN	NOTICE OF APPEAL
4/2/2013	CCOA	JALLAIN	Clerk's Certificate Of Appeal
4/4/2013	ORDR	CHRISTY	Order for Briefing
4/9/2013	STIP	BARBIE	Stipulation Rescheduling Hearing
4/10/2013	CONT	JALLAIN	Continued Hearing result for Motion scheduled on 04/10/2013 09:00 AM: Hearing Continued Motion To Disallow Costs And Attorney Fees
4/16/2013	NSRV	JALLAIN	Notice Of Service
5/7/2013	NOTH	JALLAIN	Amended Notice Of Hearing for 06/04/2013 at 4:00 PM
	MEMO	JALLAIN	Memorandum of Law in Support of Second Motion to Dismiss
	HRSC	JALLAIN	Hearing Scheduled (Motion to Dismiss 06/04/2013 04:00 PM)
5/13/2013	BRIE	JALLAIN	Brief in Support of Appeal
5/15/2013	MOTN	JALLAIN	Motion for Order Shortening Time for Hearing - Telephonic Conference for 05/17/2013 at 2:30 PM
	MOTN	JALLAIN	Motion to Stay Proceedings
	HRSC	JALLAIN	Hearing Scheduled (Motion to Stay 05/17/2013 02:30 PM) Telephonic Conference
5/17/2013	OBJC	JALLAIN	Objection to Motion to Stay Proceedings
	MOTN	JALLAIN	Motion to Augment Record

In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User	Judge
5/17/2013	HRHD	JALLAIN	Hearing Held (Motion to Stay 05/17/2013 2:30 PM) Telephonic Conference
	CMIN	JALLAIN	Court Minutes
	NOTH	KCONNOR	Notice Of Hearing
5/20/2013	ORDR	JALLAIN	Order - Denying Karreen Cornell's Motion to Stay the Proceedings
5/22/2013	AFFD	JALLAIN	Affidavit of Theodore O Creason Certifying a Portion of the Desposition of Toni C Johnson and Exhibits of April 22, 2013
	MEMO	JALLAIN	Memorandum in Oppostion Re: Motion to Dismiss
5/23/2013	HRSC	KCONNOR	Hearing Scheduled (Motion 06/04/2013 03:00 PM)
5/28/2013	REPL	KCONNOR	Respondent's Reply Brief Re: Motion to Dismiss
6/3/2013	MOTN	JALLAIN	The Estate of John Cornell's Motion to Disqualify the Law Firm of Jones, Brower & Callery, PLLC
	MEMO	JALLAIN	Memorandum in Support of the Estate of John Cornell's Motion to Disqualify the Law Firm of Jones, Brower & Callery, PLLC
6/4/2013	HRHD	CHRISTY	Hearing result for Motion scheduled on 06/04/2013 03:00 PM: Hearing Held Motion to Augment Record
	DCHH	CHRISTY	Hearing result for Motion scheduled on 06/04/2013 03:00 PM: District Court Hearing Held Court Reporter: Keith Evans Number of Transcript Pages for hearing estimated: LESS THAN 100 Motion to Augment Record
	CMIN	CHRISTY	Hearing result for Motion scheduled on 06/04/2013 03:00 PM: Court Minutes Motion to Augment Record
	ORDR	CHRISTY	Order Augmenting Record
	HRHD	JALLAIN	Hearing result for Motion to Dismiss scheduled on 06/04/2013 04:00 PM: Hearing Held
	CMIN	JALLAIN	Hearing result for Motion to Dismiss scheduled on 06/04/2013 04:00 PM: Court Minutes
6/10/2013	BREF	BARBIE	Brief of Estate of John H. Cornell
	BREF	BARBIE	Brief In Opposition to Appeal
6/11/2013	ORDR	CHRISTY	Second Order Augmenting Record
6/21/2013	MEMO	JALLAIN	Memorandum Opinion Re: Kareen Cornell
	JDMT	JALLAIN	Judgment for Dismissal
	SCAN	BARBIE	Scanned:
	SCAN	BARBIE	Scanned:
7/1/2013	REPL	CHRISTY	Appellant Rely Brief

Date: 1/26/2015

## Second Judicial District Court - Clearwater County

User: BARBIE

Time: 09:04 AM

ROA Report

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Case: CV-2012-0000277 Current Judge: Michael J Griffin

In The Matter Of Michael S. Cornell, etal.

In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User	Judge
7/2/2013		BARBIE	Filing: L2 - Appeal, Magistrate Division to District Court Paid by: Creason, Moore, Dokken & Geidl Receipt number: 0002068 Dated: 7/2/2013 Amount: \$61.00 (Cashiers Check) For: Cornell, Kareen (other party)
	NOTA	BARBIE	NOTICE OF APPEAL
	APDC	BARBIE	Appeal Filed In District Court
7/3/2013	CCOA	BARBIE	Clerk's Certificate Of Appeal
7/5/2013	AFFD	BARBIE	Affidavit In Support Of Memorandum Of Costs And Attorney Fees
	MEMO	BARBIE	Memorandum Of Costs And Attorney Fees
7/9/2013	MOTN	CBAKER	Motion To Disallow Costs And Attorney Fees
	MEMO	CBAKER	Memorandum In Support RE: Motion To Disallow Costs And Attorney Fees
7/10/2013	MOTN	BARBIE	Motion to Mediate
	NOHG	BARBIE	Notice Of Telephonic Hearing
	HRSC	BARBIE	Hearing Scheduled (Telephonic Motion Hearing 07/30/2013 01:45 PM)
7/12/2013	ORDR	CHRISTY	Order for Transcript on Appeal
7/15/2013	MOTN	JALLAIN	Motion to Disallow Costs and Attorney Fees Claimed by Toni C Johnson against the Trust
7/17/2013	BNDG	BARBIE	Bond Posted - Cash (Receipt 2311 Dated 7/17/2013 for 200.00)
7/25/2013	HRSC	BARBIE	Hearing Scheduled (Motion 09/03/2013 10:00 AM)
		BARBIE	Notice Of Hearing
7/30/2013	HRHD	CHRISTY	Hearing result for Telephonic Motion Hearing scheduled on 07/30/2013 01:45 PM: Hearing Held Set Up Meet Me
	DCHH	CHRISTY	Hearing result for Telephonic Motion Hearing scheduled on 07/30/2013 01:45 PM: District Court Hearing Held Court Reporter: Keith Evans Number of Transcript Pages for hearing estimated: LESS THAN 100 Set Up Meet Me
	CMIN	CHRISTY	Hearing result for Telephonic Motion Hearing scheduled on 07/30/2013 01:45 PM: Court Minutes Set Up Meet Me
8/2/2013	BNDV	CHRISTY	Bond Converted (Transaction number 254 dated 8/2/2013 amount 130.00)
	BNDV	CHRISTY	Bond Converted (Transaction number 255 dated 8/2/2013 amount 70.00)
	TRAN	KCONNOR	Transcript of a Motion to Dismiss

In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User		Judge
8/13/2013	NOTH	JALLAIN	Notice Of Hearing Re: Motion to Disallow Costs and Attorney Fees	Randall W. Robinson
9/3/2013	HRHD	JALLAIN	Hearing result for Motion scheduled on 09/03/2013 10:00 AM: Hearing Held Mr. Aherin to appear by Telephone	Randall W. Robinson
	CMIN	BARBIE	Court Minutes	Michael J Griffin
9/6/2013	MEMO	JALLAIN	Memorandum Opinion Re: Attorney Fees and Costs	Randall W. Robinson
	ORDR	JALLAIN	Order Re: Attorney Fees and Costs filed on July 5, 2013 are hereby DENIED.	Randall W. Robinson
9/13/2013	MOTN	JALLAIN	Motion to Augment Record	Randall W. Robinson
9/26/2013	MOTN	CHRISTY	Motion to Augment Record	Randall W. Robinson
	NOTC	CHRISTY	Notice of Hearing RE: Motion to Augment Record	Randall W. Robinson
	HRSC	CHRISTY	Hearing Scheduled (Motion 11/05/2013 10:30 AM) to Augment Record	Randall W. Robinson
10/7/2013	NOTC	JALLAIN	Notice of NO Objection	Randall W. Robinson
10/18/2013	BRIE	JALLAIN	Appellant's Brief	Randall W. Robinson
10/29/2013	ORDR	BARBIE	Order Granting Motion To Augment Record	Randall W. Robinson
	ORDR	BARBIE	Order RE: Augment Record	Michael J Griffin
11/1/2013	STIP	CHRISTY	Stipulation to Augment	Michael J Griffin
11/4/2013	HRVC	CHRISTY	Hearing result for Motion scheduled on 11/05/2013 10:30 AM: Hearing Vacated to Augment Record	Michael J Griffin
11/20/2013	BREF	JALLAIN	Respondent's Brief	Michael J Griffin
12/4/2013	BRIE	JALLAIN	Appellant's Reply Brief	Michael J Griffin
12/11/2013	NOHG	BARBIE	Notice Of Hearing RE: Appeal	Michael J Griffin
	HRSC	BARBIE	Hearing Scheduled (Oral Argument on Appeal 02/18/2014 08:30 AM)	Michael J Griffin
2/18/2014	HRHD	CHRISTY	Hearing result for Oral Argument on Appeal scheduled on 02/18/2014 08:30 AM: Hearing Held	Michael J Griffin
	DCHH	CHRISTY	Hearing result for Oral Argument on Appeal scheduled on 02/18/2014 08:30 AM: District Court Hearing Held Court Reporter: Keith Evans Number of Transcript Pages for hearing estimated: LESS THAN 100	Michael J Griffin
	CMIN	CHRISTY	Hearing result for Oral Argument on Appeal scheduled on 02/18/2014 08:30 AM: Court Minutes	Michael J Griffin
4/8/2014	ORDR	JJENSEN	Order Remanding Case	Michael J Griffin
	ORDR	JJENSEN	Order Re: Appeal	Michael J Griffin
	CHJG	JDUGGER	Change Assigned Judge	Randall W. Robinson

In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User		Judge
5/13/2014	MOTN	JDUGGER	Motion To Remove Trustee	Randall W. Robinson
	MEMO	JDUGGER	Memorandum In Support RE: Motion To Remove Trustee	Randall W. Robinson
	NOHG	JDUGGER	Notice Of Hearing RE: Motion To Remove Trustee	Randall W. Robinson
	HRSC	JDUGGER	Hearing Scheduled (Motion Hearing 05/27/2014 03:00 PM) Motion To Remove Trustee	Randall W. Robinson
	APPL	JDUGGER	Application For Appointment Of Trustee	Randall W. Robinson
	ACCP	JDUGGER	Acceptance Of Appointment	Randall W. Robinson
	NOHG	JDUGGER	Notice Of Hearing RE: Application For Appointment Of Trustee	Randall W. Robinson
	HRSC	JDUGGER	Hearing Scheduled (Application for Appointment of Trustee 05/27/2014 03:00 PM)	Randall W. Robinson
5/23/2014	OBJC	KCONNOR	Objection to Motion to Remove Trustee & Application for Apointment of Trustee	Randall W. Robinson
5/27/2014	HRHD	LMCMILLAN	Hearing result for Motion scheduled on 05/27/2014 03:00 PM: Hearing Held Motion To Remove Trustee	Randall W. Robinson
	HRHD	LMCMILLAN	Hearing result for Application for Appointment of Trustee scheduled on 05/27/2014 03:00 PM: Hearing Held	Randall W. Robinson
	CMIN	LMCMILLAN	Hearing result for Motion scheduled on 05/27/2014 03:00 PM: Court Minutes Motion To Remove Trustee	Randall W. Robinson
6/16/2014	MEMO	BARBIE	Memorandum Opinion RE: Remand Order	Randall W. Robinson
	SCAN	BARBIE	Scanned: 06/18/2014	Randall W. Robinson
	JDMT	BARBIE	Final Judgment RE: Remand Order	Randall W. Robinson
	CDIS	BARBIE	Civil Disposition entered for: Cornell, Kareen, Other Party; Cronell, John Henry, Other Party; Johnson, Toni C., Other Party; Cornell, Arlie M., Subject; Cornell, Michael S., Subject. Filing date: 6/16/2014	Randall W. Robinson
6/20/2014	SCAN	BARBIE	Scanned: 06/18/2014	Randall W. Robinson
	MOTN	CHRISTY	Motion to Correct Clerical Mistakes	Randall W. Robinson
	NOTC	CHRISTY	Notice of Hearing	Randall W. Robinson
	HRSC	CHRISTY	Hearing Scheduled (Motion to Correct Clerical Mistakes 07/07/2014 02:15 PM)	Randall W. Robinson
7/7/2014	HRHD	LMCMILLAN	Hearing result for Motion scheduled on 07/07/2014 02:15 PM: Hearing Held to Correct Clerical Mistakes	Randall W. Robinson
	CMIN	LMCMILLAN	Hearing result for Motion scheduled on 07/07/2014 02:15 PM: Court Minutes to Correct Clerical Mistakes	Randall W. Robinson
	ORDR	LMCMILLAN	Order Clarifying Citations	Randall W. Robinson



In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User	Judge
7/10/2014	NOTA	KCONNOR	NOTICE OF APPEAL
		KCONNOR	Filing: L2 - Appeal, Magistrate Division to District Court Paid by: Creason, Theodore O. (attorney for Cornell, Kareen) Receipt number: 0002085 Dated: 7/10/2014 Amount: \$81.00 (Cashiers Check) For: Cornell, Kareen (other party)
	BREF	KCONNOR	Appellant's Brief
7/14/2014	MISC	BARBIE	Clerk's Transmittal of Court File and Certificate of Appeal to District Court
7/22/2014	SCHE	BARBIE	Scheduling Order
	HRSC	BARBIE	Hearing Scheduled (Oral Argument on Appeal 09/09/2014 10:00 AM)
8/5/2014	BREF	BARBIE	Respondent's Brief
8/7/2014	CONT	BARBIE	Continued (Oral Argument on Appeal 09/23/2014 10:30 AM)
8/12/2014	BREF	BARBIE	Appellant's Reply Brief
8/21/2014		BARBIE	Notice Of Hearing
9/11/2014	ORDR	CHRISTY	Order Staying Appeal
9/22/2014	JDMT	BARBIE	Judgment
	SCAN	BARBIE	Scanned: 12-30-2014
9/23/2014	HRHD	CHRISTY	Hearing Held: Scheduling Conference (OFF THE RECORD)
	CONT	CHRISTY	Hearing result for Oral Argument on Appeal scheduled on 09/23/2014 10:30 AM: Hearing Continued to 10/15/2014 @ 11:30 a.m.
	HRSC	CHRISTY	Hearing Scheduled (Oral Argument on Appeal 10/15/2014 11:30 AM) Hearing will be conducted in Nez Perce County
10/15/2014	HRHD	CHRISTY	Hearing result for Oral Argument on Appeal scheduled on 10/15/2014 11:30 AM: Hearing Held Hearing will be conducted in Nez Perce County
	DCHH	CHRISTY	Hearing result for Oral Argument on Appeal scheduled on 10/15/2014 11:30 AM: District Court Hearing Held Court Reporter: Keith Evans Number of Transcript Pages for hearing estimated: LESS THAN 100 Hearing will be conducted in Nez Perce County
	CMIN	CHRISTY	Hearing result for Oral Argument on Appeal scheduled on 10/15/2014 11:30 AM: Court Minutes Hearing will be conducted in Nez Perce County (Nez Perce County clerk will email minutes from hearing.)
10/24/2014	MEMO	CHRISTY	Memorandum Opinion

In The Matter Of Michael S. Cornell, Arlie M. Cornell

Date	Code	User	Judge
10/24/2014	SCAN	CHRISTY	Scanned: 11-7-2014 Michael J Griffin
	ORDR	BARBIE	Order Re: Appeal - Magistrate's Order of June 16, 2014 Affirmed Michael J Griffin
	SCAN	BARBIE	Scanned: 11-7-2014 Michael J Griffin
12/2/2014		BARBIE	Filing: L4 - Appeal, Civil appeal or cross-appeal to Supreme Court Paid by: Creason, Theodore O. (attorney for Cornell, Kareen) Receipt number: 0003458 Dated: 12/3/2014 Amount: \$129.00 (Cashiers Check) For: Cronell, John Henry (other party) Michael J Griffin
	NOTA	BARBIE	NOTICE OF APPEAL Michael J Griffin
	APSC	BARBIE	Appealed To The Supreme Court Michael J Griffin
	BNDC	BARBIE	Bond Posted - Cash (Receipt 3459 Dated 12/3/2014 for 434.90) Michael J Griffin
12/3/2014	CCOA	BARBIE	Clerk's Certificate Of Appeal Michael J Griffin

CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO

2012 JUL 11 PM 4 51

CASE NO. CU12-277

BY BD DEPUTY

AHERIN, RICE & ANEGON

Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorneys for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CU2012-277

PETITION FOR SUPERVISED  
ADMINISTRATION AND REMOVAL OF  
TRUSTEE

Petitioner, John Henry Cornell, states and represents to the Court that:

1. Petitioner's interest in this matter is that of a beneficiary under The Revocable Family Trust of Michael S. and Arlie M. Cornell.
2. Arlie M. Cornell died on November 9, 2008 and Michael S. Cornell died on December 15, 2009.
3. Under the terms of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell, dated November 1, 1996, hereinafter "The Trust," Michael S. Cornell and Arlie M. Cornell, or the survivor between them, were Co-Trustees. The Trust further provided that upon the death or incapacity of the last survivor of the initial trustees, Toni C. Johnson and John H. Cornell would act as successor trustees. Toni C. Johnson is 50 years old and John H. Cornell is 47 years old.

PETITION FOR SUPERVISED ADMINISTRATION  
AND REMOVAL OF TRUSTEE -- 1

N:\Cornell, John\Pleadings\Petition Supervised Admin & Removal.docx

**Aherin, Rice & Anegon**  
Attorneys at Law  
Lewiston, Idaho

4. After the death of Arlie M. Cornell, Michael S. Cornell modified The Trust to appoint Toni C. Johnson as successor trustee upon his death or incapacity, and John H. Cornell as trustee in the event Toni C. Johnson could not act.

5. Section 1.06 of The Trust provides that amendments to The Trust could be made “during the *joint* lives of the Trustors” (emphasis added).

6. Toni C. Johnson has been serving as sole successor trustee since the death of Michael S. Cornell.

7. No inventory of the assets in The Trust at the time of the death of Michael S. Cornell has been provided.

8. The Trust, Section 4.03 provides as follows:

On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: TONI C. JOHNSON AND JOHN H. CORNELL.

9. The main asset of The Trust is house and real property. Toni C. Johnson has been residing in the house since Michael S. Cornell’s death. The property remains in the name of The Trust and has not been distributed to the two beneficiaries. Toni C. Johnson has paid no rent during her tenancy of the premises.

10. Toni C. Johnson has mismanaged The Trust in that she has used a substantial amount of the monies available to pay both expenses of maintaining the real property, where she has resided for two and one half years, and to pay her personal expenses. No money has been distributed to John Henry Cornell.

11. Toni C. Johnson has breached her fiduciary duty to settle and distribute The Trust in accordance with the terms of The Trust.

12. The best interest of The Trust would be served by removal of Toni C. Johnson as Trustee. Margaret Watkins, the sister of Arlie M. Cornell, is qualified to succeed Toni C. Johnson as trustee. Margaret Watkins has offered to serve as Trustee to preserve the assets of the Trust and save The Trust money.


13. The Trust should be subject to supervised administration because supervised administration is necessary for the protection of the beneficiaries in the estate.

14. That John Henry Cornell has incurred legal fees and costs as a result of the wrongful conduct of Toni C. Johnson as trustee and should be compensated for those expenses.

WHEREFORE, Petitioner requests that:

1. The Court fix a time and place for hearing.
  2. Toni C. Johnson be removed as trustee for cause.
  3. Margaret Watkins be appointed as successor trustee, to act without bond.
  4. The Court order the delivery of the assets and records of The Trust to Margaret Watkins.
  5. The Court order that The Trust be subject to supervised administration.
  6. The Court order legal fees and costs incurred personally by Petitioner caused by the wrongful actions of Toni C. Johnson be paid by Toni C. Johnson, personally, or from Toni C. Johnson's share of The Trust.
  7. For such other and further relief as the Court deems just and proper.
- DATED this 9<sup>th</sup> day of July, 2012.

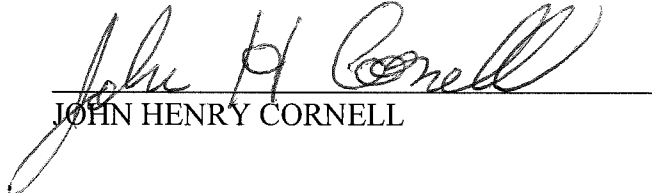
AHERIN, RICE & ANEGON

By   
Darrel W. Aherin  
Attorney for Petitioner

VERIFICATION

JOHN HENRY CORNELL, being first duly sworn, upon oath, deposes and says:

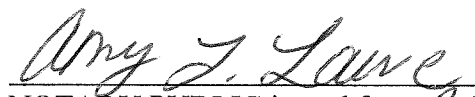
That he is the Petitioner in the above-entitled matter, that he has read the foregoing Petition for Supervised Administration and Removal of Trustee, well knows the contents thereof, and verily believes that the facts therein stated are true.

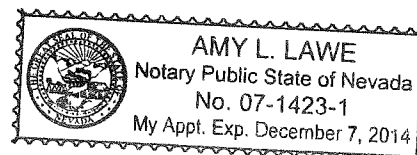
  
JOHN HENRY CORNELL

STATE OF Nevada  
COUNTY OF Clark ) ss.

27 I, Amy L. Lawe, a notary public, do hereby certify that on this day of June, 2012, personally appeared before me JOHN HENRY CORNELL, who, being by me first duly sworn, declared that he is the Petitioner in the foregoing document and that the statements therein contained are true.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year first above written.

  
NOTARY PUBLIC in and for Nevada Las Vegas  
Residing at 6955 N. Durango Dr. #1115  
My commission expires 12/7/14 <sup>LV NV</sup> 891419



CARRIE BIRD  
CLERK-DISTRICT COURT  
CLEARWATER COUNTY  
OROFINO, IDAHO ✓

2012 JUL 11 PM 4 51

CASE NO. CW12-277

BY BD DEPUTY

AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorneys for Petitioner,  
John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV2012-277

NOTICE OF HEARING

TO: TONI C. JOHNSON:

YOU WILL PLEASE TAKE NOTE that on Tuesday, August 21, 2012, at the hour of 3:30 p.m. (Pacific), or as soon thereafter as counsel may be heard, at the courtroom of the above entitled court, in Orofino, County of Clearwater, Idaho, the court will call on for hearing the petitioner, John Henry Cornell's, Petition for Supervised Administration and Removal of Trustee.

DATED this 10th day of July, 2012.

AHERIN, RICE & ANEGON

By Darrel W. Aherin  
Darrel W. Aherin  
Attorney for Petitioner

NOTICE OF HEARING -- 1

N:\Cornell, John\Pleadings\Notice of Hearing.docx

Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho



**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**NOTICE OF APPEARANCE**

Karin Seubert of the Law Firm of Jones, Brower & Callery, P.L.L.C., hereby enters an appearance as attorney of record for the respondent, TONI C. JOHNSON in the above entitled matter.

DATED this 15 day of August, 2012.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *NOTICE OF APPEARANCE* was, this 15 day of August, 2012,

☒ hand-delivered by providing a copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid, by first class mail; or  
☐ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**MOTION TO CONTINUE AND  
TO SET SCHEDULING CONFERENCE**

Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and pursuant to I.R.C.P. 7(b)(1), hereby moves this Court to continue the hearing on petitioner's *Petition for Supervised Administration and Removal of Trustee* currently scheduled for August 21, 2012 at 3:30 p.m. until such time as is determined at a scheduling conference to be set at the earliest date convenient to the court and counsel.

This Motion to Continue is made for the reason that Respondent's counsel has only recently been retained and the current hearing setting does not allow sufficient time for said counsel to prepare for said hearing in order to protect Respondent's interests.

MOTION TO CONTINUE AND TO SET  
SCHEDULING CONFERENCE

DATED this 15 day of August, 2012.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MOTION TO CONTINUE AND TO SET SCHEDULING CONFERENCE* was, this 15 day of August, 2012,

☒ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
by first class mail; or  
☐ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

MOTION TO CONTINUE AND TO SET  
SCHEDULING CONFERENCE



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

OBJECTION TO MOTION TO CONTINUE  
AND TO SET SCHEDULING  
CONFERENCE

COMES NOW the attorney for John H. Cornell, Darrel W. Aherin of Aherin, Rice & Anegon, and responds to the Motion to Continue filed by Toni C. Johnson.

The status of the trust property may be compromised by delay in getting the issue before the Court. John H. Cornell objects to a continuation of his petition and requests the opportunity to provide the Court with the back ground so the Court can assist the parties in getting this matter resolved.

OBJECTION TO CONTINUE AND TO SET SCHEDULING  
CONFERENCE -- 1

N:\Cornell, John\Pleadings\Objection to Motion to Continue and to Set Scheduling

Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

DATED this 16<sup>th</sup> day of August, 2012.

AHERIN, RICE & ANEGON

By Darrel W. Aherin  
Darrel W. Aherin  
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 16<sup>th</sup> day of August, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

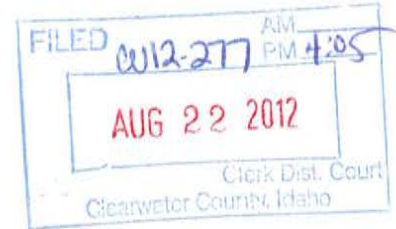
- ☐ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Federal Express

Darrel W. Aherin  
DARREL W. AHERIN

OBJECTION TO CONTINUE AND TO SET SCHEDULING  
CONFERENCE -- 2  
N:\Cornell, John\Pleadings\Objection to Motion to Continue and to Set Scheduling

Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

Karin Seubert  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )

) Case No. CV 2012-00277

) **ORDER CONTINUING HEARING AND**  
) **SETTING SCHEDULING**  
) **CONFERENCE**

\_\_\_\_\_ )  
The Court having reviewed Respondent's *Motion to Continue Hearing and to Set Scheduling Conference* and good cause shown, IT IS HEREBY ORDERED that the hearing on petitioner's *Petition for Supervised Administration and Removal of Trustee* currently set for August 21, 2012 at 3:30 p.m. is hereby vacated and a telephonic scheduling conference is hereby set for the 1<sup>st</sup> day of <sup>October</sup>~~August~~, 2012 at the hour of 10:00 a.m.~~p.m.~~. Counsel for respondent shall initiate the telephone call.

DATED this 21<sup>st</sup> day of August, 2012.

  
\_\_\_\_\_  
JUDGE RANDALL ROBINSON

ORDER CONTINUING HEARING &  
SETTING SCHEDULING CONFERENCE

-1-



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *ORDER CONTINUING HEARING AND SETTING SCHEDULING CONFERENCE* was, this 23<sup>rd</sup> day of August, 2012,

\_\_\_\_\_ hand-delivered by providing a copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
X \_\_\_\_\_ mailed, postage pre-paid,  
\_\_\_\_\_ by first class mail; or  
\_\_\_\_\_ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

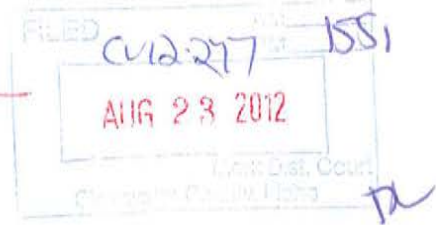
Karin Seubert  
Jones, Brower and Callery, P.L.L.C.  
1304 Idaho St.  
P.O. Box 854  
Lewiston, ID 83501

By

Barbara J. Jones  
Clerk of Court

The seal is circular with a double-line border. Inside the border, the words "WATER COUNTY" are at the top, "DISTRICT COURT" is in the middle, "SECOND" is at the bottom, and "STATE OF IDAHO" is at the very bottom. There are small stars on either side of the word "SECOND".

ORDER CONTINUING HEARING &  
SETTING SCHEDULING CONFERENCE -2-



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorneys for Petitioner,  
John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. 2012-277

AFFIDAVIT OF SERVICE



Case No. 0012-277  
Filed 8/22/12  
at 155 o'clock P M  
IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER Cam Bird  
By Drum Clerk  
Deputy

IN THE MATTER OF:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL ,

CASE NO. CV 2012-277

AFFIDAVIT OF SERVICE

STATE OF IDAHO )  
 ) ss.  
COUNTY OF NEZ PERCE )

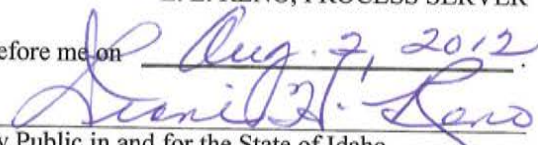
The undersigned, being first duly sworn, on oath deposes and says: That he is now and at all times herein mentioned was a citizen of the United States, over the age of twenty-one years, not a party to or interested in the above entitled action and competent to be a witness therein;

That on AUGUST 1, 2012, at 4:47 PM. at the address of .6 MILES UP DENT BRIDGE ROAD FROM JUNCTION WITH RIVERSIDE AVE., OROFINO, ID 83501 this affiant duly served a PETITION FOR SUPERVISED ADMINISTRATION AND REMOVAL OF TRUSTEE; AND NOTICE OF HEARING in the above-entitled action upon TONI C. JOHNSON by then and there personally delivering a true and correct copy thereof into the hands of and leaving same with said TONI C. JOHNSON .

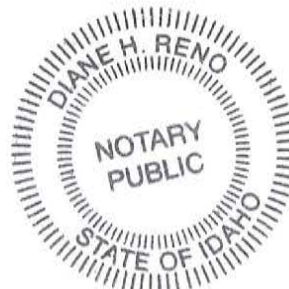


E. L. RENO, PROCESS SERVER

SUBSCRIBED AND SWORN to before me on

Aug. 7, 2012  
  
Notary Public in and for the State of Idaho,  
Residing at Lewiston, Idaho  
My commission expires : April 23, 2018

SERVICE: 10200  
AFF-PERS-2/05  
RENO & ASSOCIATES  
P.O. BOX 104  
LEWISTON, ID 83501



Karin Seubert  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813

Case No. CV12-277  
Filed 9/17/12 ✓  
at 8:18 o'clock A M  
Carrie Bird  
By BP Clerk  
Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**AFFIDAVIT OF KARIN SEUBERT**

STATE OF IDAHO )

County of Nez Perce )

KARIN SEUBERT, being first duly sworn on oath, deposes and says:

1. I am the attorney of record for Respondent Toni C. Johnson in the above-entitled matter;
2. Counsel for Petitioner John H. Cornell has confirmed that John H. Cornell died on or around August 20, 2012 leaving no issue.
3. Attached hereto as Exhibit A is a true and accurate copy of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell dated November 1, 2011.
4. Attached hereto as Exhibit B is a true and accurate copy of the First Amendment to the Revocable Trust of Michael S. Cornell and Arlie M. Cornell dated August 6, 2009.

AFFIDAVIT OF KARIN SEUBERT

-1-

DATED this 14th day of September, 2012.

Karin Seubert  
KARIN SEUBERT

SUBSCRIBED AND SWORN to before me this 14th day of September, 2012.



Judy J. Smith  
Notary Public in and for the State of Idaho,  
residing at Lewiston, therein.  
My commission expires: 7/31/2018

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *AFFIDAVIT OF KARIN SEUBERT* was, this 14th day of September, 2012,

X hand-delivered by providing a copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
\_\_\_\_\_ mailed, postage pre-paid,  
\_\_\_\_\_ by first class mail; or  
\_\_\_\_\_ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

**REVOCABLE FAMILY TRUST  
OF**

**MICHAEL S. CORNELL**

**AND**

**ARLIE M. CORNELL**

**MICHAEL S. CORNELL** and **ARLIE M. CORNELL**, husband and wife, residents of the State of California, County of Orange, desire to set forth a Trust upon the conditions and for the purposes hereafter set forth. This Trust will be known as the "**MICHAEL S. CORNELL AND ARLIE M. CORNELL REVOCABLE TRUST DATED**  
Nov. 1, 1996."

**ARTICLE ONE**

**Section 1.01 Trust Estate**

All property hereafter transferred or conveyed to and received by the Trustee to be held pursuant to the terms of this instrument is herein called the "Trust Estate" and shall be held, administered, and distributed by the Trustee as provided in this Declaration of Trust.

**Section 1.02 Meaning of Words**

- a) The term "Husband" shall mean **MICHAEL S. CORNELL**;
- b) The term "Wife" shall mean **ARLIE M. CORNELL**;
- c) The term "Trustor" shall refer individually and collectively to Husband and Wife.

**Section 1.03 Trustee Designation**

Husband and Wife are hereby designated as Co-Trustees of all trusts created by or to be created pursuant to this Declaration of Trust. Should either Husband or Wife become unable because of death, incapacity or other cause, to serve as such a Co-Trustee, or should either resign as such a Co-Trustee, before the natural termination of all trusts provided for in this Declaration, the remaining Co-Trustee, Husband or Wife, shall thereafter serve as sole Trustee as provided in this Declaration. The term "Trustee" as used in this Declaration shall refer collectively to Husband

and Wife so long as they shall serve as such Co-Trustees and thereafter to such of them as may serve as sole Trustee. This paragraph is subject to Section 9.01.

#### **Section 1.04 Additions to Trust Properties**

- a) At any time during the continuance of any trust hereunder, its Trustees, in their sole discretion after consideration of the possible tax consequences thereof to all concerned, is authorized to receive additions of cash or other properties to such trust, subject to any conditions to which such Trustees may agree, from any source whatsoever without limitation, whether by gift, will, or otherwise. However, the Trustees shall accept all assets which any person or persons may give, devise, and/or bequeath by last will and testament to any trust or trusts hereunder as well as all assets which may be transferred to such trust or trusts pursuant to the express provisions of any other trust document or documents of any kind.
- b) Furthermore, at any time any person or persons may designate any trust hereunder as the beneficiary, primary or contingent, of any insurance, pension, or other death benefit, relating to the life of anyone (such designation to be presumed to be revocable unless it is expressly irrevocable) and, until such benefit matures by reason of death, the Trustees shall have no responsibility whatsoever with respect thereto, it being intended that, unless and until the trust which is the designated beneficiary of such death benefit becomes the owner of the insurance proceeds as actually become payable by reason of death.
- c) All additions, unless specifically designated to a certain trust or trusts hereunder or unless there is only one trust then in existence hereunder, shall be considered as made to the Trust as hereinafter defined. Any addition, including any income earned thereon prior to actual receipt of the addition by the trust, shall be added to the corpus of such trust and thereafter held, managed, and distributed by its Trustees as a part of the corpus to which the same is added.

#### **Section 1.05 Separate Property to Remain Separate**

All property now or hereafter conveyed or transferred to the Trustee to be held by the Trustee pursuant to this Declaration which was community property, quasi-community property, or separate property at the time of such conveyance or transfer, shall remain, respectively, community property, quasi-community property, or the separate property of the Trustor transferring such property to the Trustee.

When separate property is held in the Trust, it may be withdrawn from the Trust on the sole signature of the Trustor who put it in the Trust. This applies to real property, as well as personal property.

## **Section 1.06 Amendment and Revocation**

At any time during the joint lives of the Trustors, jointly as to Community Property and individually as to his or her own separate property, Trustors may, by a duly executed instrument;

a) Amend this trust agreement (including its technical provisions) in any manner and/or

b) Revoke this trust agreement in part or in whole, in which latter event any and all trust properties shall forthwith revert to such Trustor free of trust. Such instrument of amendment or revocation shall be effective immediately upon its proper execution by Trustor(s), but until a copy has been received by a trustee, that Trustee shall not incur any liability or responsibility either (i) for failing to act in accordance with such instrument or (ii) for acting in accordance with the provisions of this trust agreement without regard to such instrument.

## **ARTICLE TWO**

### **Section 2.01 Trust Income**

During the joint lives of the Trustors, the Trustee shall at least annually unless otherwise directed by both Trustors in writing, pay to or apply for the benefit of Husband and Wife, all of the net income from the Trust Estate in the same proportion as each of their respective interests in the Trust Estate.

### **Section 2.02 Protection of Trustor in Event of Incapacity**

During the joint lives of the Trustors, should either Trustor become incapacitated as defined in Section 2.03 below, the Trustee may, in the Trustee's discretion;

a) Pay the entire net income of the Trust Estate in monthly or other convenient installments to the remaining competent Trustor; or

b) Apply such portion of the net income, up to the whole thereof, of the Trust Estate as the Trustee may deem in his absolute discretion reasonable and proper for the benefit of the Trustor so adjudged to be incompetent or unable to manage his or her own affairs; or

c) Declare void and without effect, any attempt by the Trustor to exercise the reserved rights of revocation, amendment, withdrawal of assets, control over Trustees, etc., unless a court of competent jurisdiction determines otherwise or Trustor's

disappearance constitutes incapacity. During any period of either Trustor's incapacity, this Trust is irrevocable and unamendable. As Trustors do not intend that any taxable gift be deemed made by reason of such irrevocability, it is expressly provided that, notwithstanding the foregoing, Trustors shall at all times have the power to appoint to any person, designated in any way in this agreement as a vested or contingent beneficiary, any and all assets contained in this trust at the time of Trustor's death, said power being exercisable, however, only by specific reference to said power in Trustor's will duly provided for probate.

### **Section 2.03 Incapacity**

In the event that any Trustee or any beneficiary hereunder comes into possession of any of the following:

- a) A court order, which such Trustee or beneficiary deems to be jurisdictionally proper and still concurrently applicable, holding a person to be legally incapacitated to act in his or her own behalf or appointing a guardian to act for him or her, or
- b) Duly executed, witnessed, acknowledged written certificates, at least one of which is then unrevoked, of two licensed physicians (each of whom represents that he or she is certified by a recognized medical board), each certifying that such physician has examined a person and has concluded that, by reason of accident, or mental deterioration, or similar cause, such person had, at the date thereof, become incapacitated to act rationally and prudently in his or her own financial best interests, or
- c) Evidence which such Trustee or beneficiary deems to be creditable and still currently applicable that a person has disappeared, is unaccountably absent, or is being detained under duress where he or she is unable effectively and prudently to look after his or her own interests.

Then, in that event and under those circumstances:

- a) Such person shall be deemed to have thereupon become incapacitated, as that term is used in and for all of the purposes of this instrument, and
- b) Such incapacity shall be deemed to continue until such court order, certificates, and/or circumstances have become inapplicable or have been revoked, and
- c) The named successor trustee shall immediately become the Trustee, acting with all the rights and powers described herein.

Any physician's aforesaid certificate may be revoked by a similar certificate to the effect that such person is no longer thus incapacitated, executed either by (i) the original certifying



physician or (ii) two other licensed, board certified physicians. No Trustee shall be under any duty to institute any inquiry into a person's possible incapacity, but the expense of any such inquiry reasonably instituted may be paid from trust assets. Payment for said inquiry refers both to a reasonable inquiry as to the incapacity of such individual and to that inquiry as to the revocation of such a Certificate.

#### **Section 2.04 Protection in the Event of Catastrophic Illness**

If both Trustors are living and a catastrophic illness affects one of the Trustors, then the remaining Trustor may divide the Trust assets in such a way as to qualify the infirm Trustor for state assistance payments and may remove the infirm Trustor as a Trustee of this Trust. A catastrophic illness is one which is reasonably anticipated to extend for a period of six (6) months or longer, and which renders the affected Trustor incompetent or in need of full time care. If competent, a Trustor may make the determination to divide the Trust Estate in accordance with these provisions. If the Trustor affected by the catastrophic illness is not competent to manage his or her affairs, then the division shall be made by the person designated as the affected Trustor's attorney-in-fact in his or her durable power of attorney, or by a court appointed conservator of the affected Trustor.

From and after the division of the Trust assets, the share of the Trust Estate set aside for each Trustor shall be his or her sole and separate property for all purposes, and if that property remains part of the Trust Estate, subject to the terms and conditions set forth within this trust agreement. The Trustor who is not infirm may use assets of the infirm Trustor to purchase an annuity or other assets which do not disqualify the infirm Trustor from state assistance.

#### **Section 2.05 Principal Invasion**

During the joint lives of the Trustors, should the net income of the Trust Estate be insufficient to provide for the care, maintenance or support of the Trustors as herein defined, the Trustee may, in the Trustee's absolute discretion, pay to or apply for the benefit of the Trustors, or either of them, or any of their dependents, such amounts from the principal of the Trust Estate as the Trustee may, in the Trustee's absolute discretion, from time to time deem necessary or advisable for the care, maintenance or support of the Trustors. As used in this section, the term "care, maintenance or support of the Trustors" shall mean:

- a) The providing of proper care, maintenance and support for the Trustors, or either of them, during any period of illness, or other want or necessity;



b) The maintenance of the Trustors, and each of them, in the manner of living to which they, and each of them, are accustomed on the date of this Declaration;

c) The support and maintenance in the manner in which they are accustomed on the date of this Declaration whether adult or minor, dependent on the Trustors, or either of them, for such support and maintenance; and

d) The education in the manner desired by the Trustors of any person, whether adult or minor, dependent on the Trustors, or either of them, for such education.

### **ARTICLE THREE**

#### **Section 3.01 Provisions After First Death**

On the death of either Trustor, leaving the other Trustor surviving him or her, the then Trustee shall collect all insurance proceeds payable to the Trustee by reason of such death, all bequests and devises distributable to the Trust Estate under the terms of the Last Will and Testament of the deceased Trustor and convey the assets according to the instructions set forth herein. The Trustee may use all income and principal for the benefit of the surviving Trustor.

#### **Section 3.02 Last Expenses**

On the death of the first of the Trustors to die, the Trust shall pay either from the income or principal of the Trust as the Trustee in the Trustee's absolute discretion may determine, the expenses of the deceased Trustor's last illness, funeral, burial and any inheritance, estate or death taxes that may be due by reason of the deceased Trustor's death, unless that Trustee in his or her absolute discretion determines that other adequate provisions have been made for the payment of such expenses and taxes.

#### **Section 3.03 Surviving Spouse**

The Trustee shall hold, administer and distribute all Trust assets for the benefit of the surviving spouse, both as to income and principal, unless otherwise herein provided.

### **ARTICLE FOUR**

#### **Section 4.01 Second Death**

On the death of the Trustor last to die, herein called "Surviving Trustor", the principal of the Trust and any accrued or undistributed net income from the Trust shall go to the successor

Trustee and the Trustee shall apply and distribute the net income and principal of the Trust Estate as set forth herein.

#### **Section 4.02 Payment of the Second Death Expenses**

On the death of the surviving Trustor, the Trustee shall pay either from the income or principal of the Trust or partly from the income and partly from the principal of the Trust, as the Trustee in his or her absolute discretion may determine, the expenses of the Surviving Trustor's last illness, funeral, burial and any inheritance, estate or death taxes that may be due by reason of the inclusion of any portion of the Trust Estate in the Surviving Trustor's estate for the purposes of any such tax, unless the Trustee in his or her absolute discretion determines that other adequate provisions have been made for the payment of such expenses and taxes.

#### **Section 4.03 Trust Income and Principal Distribution**

On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two(2) equal shares and distribute them to the following beneficiaries:

**TONI C. JOHNSON and JOHN H. CORNELL**

a) If any child, for whom a share of the Trust Estate has been set aside, should die prior to the above distribution, then the Trustee shall distribute all of such deceased child's share of the Trust Estate to his or her surviving issue in equal shares. If any issue are minors, the funds from the Trust Estate shall be held in a bank, savings and loan or money market fund and used for their care, welfare and college education. Any funds remaining shall be distributed at age 25. If there is no surviving issue, then all of the deceased child's share of the Trust Estate shall be added to the shares set aside for the benefit of the Trustors' other living child, as hereinabove provided, including proportionately both the distributed and the undistributed portions of each such share, to be distributed as an equal part of such other shares.

b) If all of the Trustors' beneficiaries outlined above should die prior to final distribution of the Trust Estate, all of the Trust Estate not disposed of as hereinabove provided shall be distributed one-half (1/2) to the persons who would then be the husband's heirs and the other one-half (1/2) to the persons who would then be the heirs of the wife. The identities and respective shares of the aforesaid heirs to be determined in accordance with the intestate succession laws of the State of

California then in effect relating to the succession of separate property not acquired from a predeceased spouse. If either of the Trustors have no such heirs, then all of the Trust estate shall be distributed to the aforesaid heirs of the other Trustor.

#### **Section 4.04 Trust Termination**

Unless sooner terminated as otherwise provided herein, all of the trusts provided for herein shall terminate on the death of the survivor of the Trustors and their children living at the date that any of the trusts created hereunder first becomes irrevocable.

#### **Section 4.05 Simultaneous Death**

Should both Trustors die simultaneously or under any circumstances rendering it difficult or impossible to determine which Trustor predeceased the other, each Trustor shall, for the purpose of disposing of his separate property be deemed to have predeceased the other Trustor.

### **ARTICLE FIVE**

#### **Section 5.01 Non-Income Producing Property**

During the lives of either of the Trustors, the Trustee is authorized to retain in the trusts provided for in this Declaration, for so long as the Trustee may deem advisable and in the best interest of such trusts, any property received by the Trustee from the Trustors, or either of them, whether or not such property is of the character permitted by law for the investment of trust funds. After the death of the last Trustor to die, the Successor Trustee may retain any such property in the trust provided for in this Declaration only so long as such property is productive of income, (subject to Section 5.08 of Article 5 herein).

#### **Section 5.02 Trustee Powers**

The Trustee shall, with respect to any and all property which may at any time be held by the Trustee in trust pursuant to this Declaration, whether such property constitutes principal or accumulated income of any trust provided for in this Declaration, have power, exercisable in the Trustee's absolute discretion at any time and from time to time on such terms and in such manner as the Trustee may deem advisable to:

a) Sell, convey, exchange, convert, improve, repair, partition, divide, allot, subdivide, create restrictions, easements, or other servitudes thereon, operate and control;

- b) Lease for terms within or beyond the term of any trust provided for in this Declaration and for any purpose, including exploration for and removal of gas, oil and other minerals; and enter into any covenants and agreements relating to the property so leased or any improvements which may then or thereafter be erected on such property;
- c) Encumber or hypothecate for any trust purpose by mortgage, deed of trust, pledge or otherwise;
- d) Carry insurance of such kinds and in such amounts at the expense of the trusts provided for in this Declaration as the Trustee may deem advisable;
- e) Commence or defend at the expense of any trust provided for in this Declaration such litigation with respect to any such trust or any property of the Trust Estate as Trustee may deem advisable and employ, for reasonable compensation payable by any such trust, such counsel as the Trustee shall deem advisable for that purpose;
- f) So long as the original trustee or trustees are managing the Trust, they may invest and reinvest in common or preferred stocks, securities, investment trusts, bonds and other property, real or personal, foreign or domestic, including any undivided interest in any one or more common trust funds, whether or not such investments be of the character permissible for investments by fiduciaries under any applicable law, and without regard to the effect any such investment may have upon the diversification of investments. Trustees are specifically authorized to invest in Mutual Funds, Limited Partnerships, option accounts (covered or not), including, but not limited to, Currency, Index, Stocks, Futures, Commodities, Precious Metals, etc., traded on the Chicago Board of Trade or other nationally recognized Boards of Trade. Trustees expressly have the authority to trade on margin.
- g) Vote, by proxy or otherwise, in such manner as Trustee may determine to be in the best interests of the trust provided for in this Declaration, any securities having voting rights held by the Trustee pursuant to this Declaration;
- h) Pay any assessments or other charges levied on any stock or other security held by the Trustee in trust pursuant to this Declaration;
- i) Exercise or not exercise, as Trustee may deem best, any subscription, conversion or other rights or options which may at any time attach, belong or be given instruments held by it in trust pursuant to this Declaration;
- j) Participate in any plans or proceedings for the foreclosure, reorganization, consolidation, merger or liquidation of any corporation or organization that has issued securities held by the Trustee, or will issue securities to be held by Trustee in

trust pursuant to the terms of this Declaration, to deposit securities with and transfer title or securities on such terms as Trustee may deem in the best interest of the trusts to any protective or other committee established to further or defeat any such plan or proceeding;

k) Enforce any mortgage or deed of trust or pledge held by Trustee in trust pursuant to this Declaration and at any sale under any such mortgage, deed of trust or pledge, to bid and purchase at the expense of any trust provided for in this Declaration, any property subject to such security instrument;

l) Compromise, submit to arbitration, release with or without consideration and otherwise adjust any claims in favor of or against any trust provided for in this Declaration;

m) Distribute gifts of up to \$10,000.00 per year per donee out of principal or interest or in any proportion of the two that the Trustee, in his sole discretion, deems advisable;

n) Invest in and guarantee a business or Trustee of the Trust capitalizing on the business venture;

o) Subject to any limitations expressly set forth in this Declaration and faithful performance of Trustee's fiduciary obligations, to do all such acts, take all such proceedings, and exercise all such rights and privileges as could be done, taken or exercised by an absolute owner of the trust property; and

p) So long as both of the original Trustees are serving as Trustees hereunder, either of them shall have the power to bind the trust in any and all transactions, including, but not limited to (1) collecting receipts; (2) paying disbursements; (3) securing assets; (4) writing checks and making withdrawals from bank accounts; (5) purchasing, selling and pledging securities and other property; and (6) exercising any power conferred on the Trustees pursuant to the terms of this Declaration of Trust, and the action of either original Trustee may be relied upon by third parties dealing with those Trustees or either of them.

q) The trustee is empowered to buy, sell, trade and deal in options, precious metals, stocks, bonds and securities of all nature (including "short" sales and speculative option transactions - i.e. uncovered puts and calls, option spreads, option straddles, and option combinations) and commodities of every nature, and contracts for the future delivery of commodities of every nature on margin and otherwise; and for such purpose to maintain and operate margin and commodity accounts with brokers; and in connection therewith to borrow money and to pledge any and all stocks, bonds, securities, commodities and contracts for the future delivery thereof, held or purchased by the trustee, with such brokers as securities for loans and advances made to the trustee.

r) The successor trustee has the authority to enter the safe deposit box in Trustors' names, individually or as Trustees of the Trust, and remove the contents thereof.

### **Section 5.03 Power to Borrow**

The Trustee shall have the power to borrow money for any trust purpose (including from the probate estate for the purpose of paying taxes) on such terms and conditions as the Trustee may deem proper from any person, firm or corporation, including the power to borrow money on behalf of one trust from any other trust provided for in this Declaration, and to obligate the trusts, or any of them, provided for in this Declaration to repay such borrowed money.

### **Section 5.04 Power To Loan to Trusts**

The Trustee is authorized to loan or advance Trustee's own funds to any trust provided for in this Declaration for any trust purpose and to charge for such loan or advance the rate of interest that Trustee, at the time such loan or advance is made, would have charged had such loan or advance been made to a person not connected with such trusts having a net worth equal to the value of the principal of such trust. Any such loan or advance, together with the interest accruing on such loan or advance, shall be a first lien against the principal of the Trust to which such loan or advance is made and shall be repaid from the income or principal of such trust as in the discretion of the Trustee appears for the best interest of such trust and its beneficiaries.

### **Section 5.05 Purchase of Securities**

The Trustee is authorized to purchase securities or other property from and to make loans and advancements from the Probate Estate with or without security to the executor or other representative of the estate of either Trustor.

### **Section 5.06 Manner of Holding Title**

The Trustee may hold securities or other property held by Trustee in trust pursuant to this Declaration in Trustee's name as Trustee under this Declaration, in Trustee's own name without a designation showing it to be Trustee under this Declaration, in the name of Trustee's nominee, or the Trustee may hold such securities unregistered in such condition that ownership will pass by delivery.

### **Section 5.07 Expense and Proceeds Allocation**

Except as otherwise specifically provided in this Declaration, the Trustee shall allocate all receipts and expenditures received

or incurred by Trustee in administering the trusts provided for in this Declaration to the income or principal of each such trust in the manner provided in this Declaration to the income or principal of each such trust in the manner provided by the Revised Uniform Principle and Income Act in effect on the date of this Declaration in the State of California.

#### **Section 5.08 Trustors' Residence**

After the death of the first Trustor to die, the Trustee is authorized to retain in any trust or trusts provided for in this Declaration for the personal use of the Surviving Trustor any property occupied by the Trustors as their principle place of residence at the time of death of the first Trustor to die for so long as the Surviving Trustor may desire to occupy such residence property. During such retention, the Trustee shall pay, from either the income or principal of the trust provided for in this Declaration as the Trustee may deem in the best interests of such trusts and their beneficiaries, all taxes and assessments levied or assessed against such property and all costs of keeping such property properly insured, maintained and repaired. Surviving Trustor shall not be obligated for payment of rent. On written request of the Surviving Trustor, the Trustee may sell such property and replace it with other property, to be retained in trust in the same manner as the replaced residence property, suitable in the Trustee's judgment as a residence for the Surviving Trustor.

### **ARTICLE SIX**

#### **Section 6.01 Coordination with Trustor's Probate Estate**

a) At any time during the continuance of the original trust hereunder and after the first Trustor's death, its Trustees may distribute to the deceased Trustor's probate estate, as a beneficiary of such trust, cash and/or other property out of any assets then held by such trust, including any which are classified as postdeath trust income, to whatever extent such Trustees, in their sole and uncontrolled discretion, deem advisable in the best interest of Trustor's beneficiaries generally.

b) To relieve Trustor's probate estate from the burden of paying them, any estate, inheritance, succession, or other similar death taxes which may be imposed as a result of Trustor's death, as well as funeral, last illness, and administrative expense, debts, and other proper charges against Trustor's estate, may at any time be paid out of any assets then held by the original trust hereunder, including any which are classified as postdeath trust income, to whatever extent the Trustees of the original Trust hereunder, in their sole and uncontrolled

discretion, deem advisable and in the best interest of the Trustor's beneficiaries generally.

c) All other provisions hereof to the contrary notwithstanding, under no circumstances shall any restricted proceeds, as hereinafter defined, be either directly or indirectly (i) distributed to or for the benefit of Trustor's executors or Trustor's probate estate or (ii) used to pay any obligations of Trustor's estate. The term "restricted proceeds" means:

- 1) All qualified plans, individual retirement accounts, or similar benefits which are received or receivable by any Trustee hereunder which, if paid solely to a beneficiary "other than the executor" of the Trustor's estate, would be excluded from Trustor's gross estate for federal estate tax purposes under Section 2039 of the Internal Revenue Code in effect at Trustor's death; and

- 2) All proceeds of insurance on Trustor's life which, if paid to a beneficiary other than Trustor's estate, would be exempt from inheritance or similar death taxes under applicable state death tax laws.

However, the term "restricted proceeds" shall not include any qualified plan or similar death benefits which would not in fact be excluded from Trustor's gross estate under the applicable subsection of Section 2039 even though such benefits were receivable by a beneficiary other than Trustor's executor nor shall it include any life insurance proceeds which would be subject to no greater state or federal death tax should this restriction not exist.

#### **Section 6.02 Direction to Minimize Taxes**

In the administration of the trust hereunder, its fiduciaries shall exercise all tax related elections, options, and choices which they have, in such manner as they in their sole but reasonable judgment (where appropriate, receiving advice of tax counsel), believe will achieve the overall minimum in total combined present and reasonably anticipated (but appropriately discounted) future administrative expenses and taxes of all kinds, upon not only such trust, but also its beneficiaries, the other trusts hereunder and their beneficiaries and Trustor's probate estate. Without limitation on the generality of the foregoing direction (which shall to that extent supersede the usual fiduciary duty of impartiality), such fiduciaries shall not be accountable to any person interested in any trust or in Trustor's estate for the manner in which they shall carry out this direction to minimize overall taxes and expenses (including any decision they may make not to incur the expense of detailed analysis of alternative choices) and, even though their decisions in this regard may result in increased tax or decreased distribution to a trust, to the estate, or to one or more beneficiaries, there shall in no event be any compensation



readjustments or reimbursements between any of the trusts hereunder or any of the trust or estate accounts or beneficiaries by reason of the manner in which the fiduciaries thus carry out said direction.

## ARTICLE SEVEN

### Section 7.01 Incontestability

The beneficial provisions of this instrument (and of Trustor's Last Will and Testament) are intended to be in lieu of any other rights, claims, or interest of whatsoever nature, whether statutory or otherwise, except bona fide pre-death debts, which any beneficiary hereunder may have against or in Trustor's estate or the properties in trust hereunder. Accordingly, if any beneficiary hereunder asserts any claim (except a legally enforceable debt), statutory election, or other right or interest against or in Trustor's estate, Trustor's Will, or any properties of this Trust, other than pursuant to the express terms hereof or of said Will, or directly or indirectly contests, disputes, or calls into question, before any court, the validity of any provisions of this instrument or of said Will, then:

- a) Such beneficiary shall thereby absolutely forfeit any and all beneficiary interests of whatsoever kind and nature which such beneficiary might otherwise have under this instrument and the interests of the other beneficiaries shall be proportionately increased and/or advanced;
- b) All of the provisions of this instrument, to the extent that they confer any benefits, powers, or right whatsoever upon such claiming, electing, or contesting beneficiary, shall thereupon become absolutely void and revoked; and
- c) Such claiming, electing, or contesting beneficiary, if then acting as a Trustee hereunder, shall automatically cease to be a Trustee and shall thereafter be ineligible either to select, remove or become a Trustee hereunder.

The foregoing shall not be construed, however, to limit the appearance of any beneficiary as a witness in any proceeding involving this instrument or said Will nor to limit any beneficiary's appearance in any capacity in any proceeding solely for the construction of either of said documents.

## ARTICLE EIGHT

### Section 8.01 Accrued Income on Termination of Beneficial Interest

Whenever the right of any beneficiary to payments from the net income or principal of any trust provided for in this Declaration shall terminate either by reason of death or other cause, any accrued net income from such trust undistributed by the Trustee on the date of such termination shall be held, administered and distributed by the Trustee in the same manner as if such income had accrued and been received by the Trustee after the date such beneficiary's right to receive payments from such trust terminated.

### Section 8.02 Periodic Accountings

A Trustee shall be entitled to pay himself reasonable compensation from time to time without prior court order and shall be reimbursed for all out-of-pocket expenses incurred in administering the Trust.

During the lifetime of either Trustor, the Trustees shall account only to the Settlers or the survivor of them, and their written approval shall be final and conclusive in respect to transactions disclosed in the account as to all beneficiaries of the trust, including unborn and contingent beneficiaries. After the deaths of both Trustors, the Trustees shall render an accounting from time to time but not less frequently than annually after any prior accounting regarding the transactions of any trust created in this instrument.

Accountings shall be made by delivering a written accounting to each beneficiary entitled to current income distribution, or if there are no current income beneficiaries, to each beneficiary entitled to current distribution out of income or principal in the Trustees' discretion. If any person entitled to receive an accounting is a minor or is under a disability, the accounting shall be delivered to his parents or the guardian of his person if he is a minor or to the guardian or conservator of his person if he is under any other disability. Unless any beneficiary, including parents, guardians or conservators of beneficiaries, shall deliver a written objection to the Trustees within sixty (60) days after receipt of the Trustees' account, the account shall be final and conclusive in respect to the transactions disclosed in the account as to all beneficiaries of the trust including unborn and unascertained beneficiaries. After settlement of the account by agreement of the parties objecting to it or by the expiration of the sixty (60) day period, the Trustees shall no longer be liable to any beneficiary of the trust including unborn and unascertained beneficiaries, in respect to transactions disclosed in the account, except for the Trustees' intentional wrongdoing or fraud.

### **Section 8.03 Spendthrift Provision**

Except as otherwise expressly provided in this Declaration, no beneficiary of any trust provided for in this Declaration shall have any right, power or authority to alienate, encumber or hypothecate his or her interest in the principal or income of such trust in any manner, nor shall such interest of any beneficiary be subject to claims of his or her creditors or liable to attachment, execution or other process of law.

### **Section 8.04 Distribution in Kind or Cash**

On any division of the assets of the Trust Estate into shares or partial shares and on any final or partial distribution of the assets of the Trust Estate or any trust provided for in this Declaration, the Trustee, in its absolute discretion, may divide and distribute such assets in kind, may divide or distribute undivided interests of such assets, or may sell all or any part of such assets and make division or distribution in cash or partly in cash and partly in kind. The decision of the Trustee, either prior to or on any division or distribution of such assets, as to what constitutes a proper division of such assets of the Trust Estate or any trust provided for in this Declaration shall be binding on all persons in any manner interested in any trust provided for in this Declaration.

### **Section 8.05 Definition of Children**

The terms "child" and "children" as used in this Trust shall mean the lawful issue of the Trustors or either of them and include children legally adopted by the Trustors or either of them.

## **ARTICLE NINE**

### **Section 9.01 Trustees**

The following will act as Trustees in the following order of succession:

FIRST: The undersigned, **MICHAEL S. CORNELL**, Husband and **ARLIE M. CORNELL**, Wife, together as co-trustees.

SECOND: At the death or incapacity of the last survivor of the undersigned, TONI C. JOHNSON and JOHN H. CORNELL shall act as Co-Trustees.

THIRD: A trustee chosen by the majority of beneficiaries, with a parent or legal guardian voting for minor beneficiaries; provided, however, that the issue of any deceased child shall have collectively only one vote.

## ARTICLE TEN

### Section 10.01 Perpetuities Savings Clause

In any event and anything to the contrary herein contained notwithstanding, the trusts created in this agreement shall terminate upon the day next preceding the expiration of twenty-one (21) years after the death of the undersigned and their issue now living. In the event these trusts shall not have previously terminated in accordance with the terms provided for in this paragraph, the Trustee shall distribute the Trust Estate as it shall then be constituted, together with any net income, to the beneficiaries then entitled to the income from the Trust Estate in the same proportions in which they are entitled to such income.

## ARTICLE ELEVEN

### Section 11.01 Governing Law

It is not intended that the laws of only one particular state shall necessarily govern all questions pertaining to all of the trusts hereunder. Rather;

- a) The validity of the trust hereunder, as well as that validity of the particular provisions of that trust, shall be governed by the laws of whatever state having any sufficient connection with such trust will support such validity.
- b) The meaning and effect of the terms of this trust instrument and of any other trust instrument related hereto shall be governed by the laws of the state in which the initial trust under that trust instrument was created, that is, California in the case of this instrument, and such other state as may be designated in the governing instrument of any trust receiving an appointment hereunder.
- c) The administration of the trust hereunder shall be governed by the laws of the state in which that trust is then being administered (based on the location of the principal office of the Trustee then having custody of that Trust's principal assets and records), which state's courts shall have exclusive jurisdiction over that administration of the trust with respect to any period during which it was thus being administered in that state.

The foregoing shall apply even though the situs of some trust assets or the home of the Trustor, a trustee, or beneficiary may at some time or times be elsewhere.

### Section 11.02 Invalidity of Any Provision

Should any provision of this Declaration be or become invalid or unenforceable, the remaining provisions of this Declaration shall be and continue to be fully effective.

### Section 11.03 Successor Trustees

Any successor Trustee taking office pursuant to Article Nine of this Declaration shall forthwith succeed to all title of the prior Trustee and shall have all the power, rights, discretions and obligations conferred on such Trustee by this Declaration.

1. We, and each of us, have read the foregoing Declaration of Trust; The foregoing Declaration of Trust correctly states the terms and conditions under which the Trust Estate is to be held, managed, administered and disposed of by the Trustee;

2. We, and each of us, approve such Declaration of Trust in all particulars; and

3. As the Trustee named in such Declaration of Trust, we and each of us, approve and accept the trusts provided for in such Declaration.

EXECUTED ON THIS 15<sup>th</sup> DAY OF Nov., 1976, AT  
Santa Ana, CALIFORNIA.

BY: Michael S. Cornell TRUSTEE  
MICHAEL S. CORNELL

BY: Archie M. Cornell TRUSTEE  
ARLIE M. CORNELL

BY: Michael S. Cornell TRUSTOR  
MICHAEL S. CORNELL

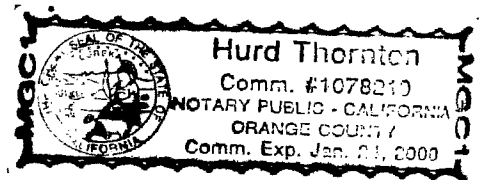
BY: Archie M. Cornell TRUSTOR  
ARLIE M. CORNELL

STATE OF CALIFORNIA )  
 )SS  
COUNTY OF Orange

ON 11-1-96, BEFORE ME, Hurd Thornton PERSONALLY  
APPEARED **MICHAEL S. CORNELL** AND **ARLIE M. CORNELL** X PERSONALLY KNOWN TO ME OR  
\_\_\_\_ PROVED TO ME ON THE BASIS OF SATISFACTORY EVIDENCE TO BE THE PERSONS WHOSE  
NAMES ARE SUBSCRIBED TO THE WITHIN INSTRUMENT, AND ACKNOWLEDGED THAT THEY EXECUTED  
THE SAME IN THEIR AUTHORIZED CAPACITIES, AND THAT BY THEIR SIGNATURES ON THE  
INSTRUMENT THE PERSONS, OR THE ENTITY UPON BEHALF OF WHICH THE PERSONS ACTED,  
EXECUTED THE INSTRUMENT.

WITNESS MY HAND AND OFFICIAL SEAL.

Hurd Thornton



NOTARY PUBLIC

## MEMORANDUM OF TRUST

THIS AGREEMENT made this 1st day of Nov, 1996,  
by and between **MICHAEL S. CORNELL** and **ARLIE M. CORNELL**, as  
Trustors and Trustees.

### WITNESSETH THAT:

1. Contemporaneously herewith Trustors and Trustees have entered into a Revocable Living Trust known as

the "**MICHAEL S. CORNELL AND ARLIE M. CORNELL REVOCABLE TRUST** dated  
11-1-96."

2. This Memorandum of Trust is executed as evidence of the existence of the **MICHAEL S. CORNELL AND ARLIE M. CORNELL REVOCABLE TRUST**, the terms and conditions of which are hereby incorporated herein by this reference.

3. Said Trust Agreement grants to the Trustee all of the powers contained in West's Annotated California Probate Code Sections 16,200 et seq., all of which are incorporated herein by this reference. See Exhibit "A" attached hereto.

4. Any person may rely on this Memorandum of Trust as proof of the existence of said Trust and is relieved of any obligation to verify that any transaction entered into by the Trustee is consistent with the terms and conditions of said Trust.

5. The Co-Successor Trustees are **TONI C. JOHNSON** and **JOHN H. CORNELL**.

IN WITNESS WHEREOF, the Trustors and the Trustees have signed this Memorandum of Trust the day and year first above written.

TRUSTORS/TRUSTEES

*Michael S. Cornell*  
**MICHAEL S. CORNELL**

*Arlie M. Cornell*  
**ARLIE M. CORNELL**

STATE OF CALIFORNIA)

)SS

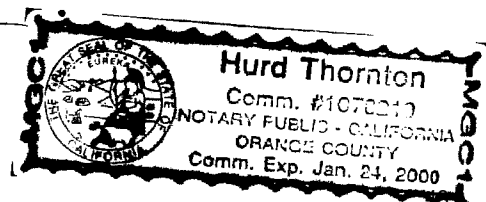
COUNTY OF Orange

ON 11-1-96, BEFORE ME, *Hurd Thornton*, PERSONALLY  
APPEARED **MICHAEL S. CORNELL** and **ARLIE M. CORNELL** PERSONALLY KNOWN TO  
ME OR X PROVED TO ME ON THE BASIS OF SATISFACTORY EVIDENCE TO BE THE  
PERSONS WHOSE NAMES ARE SUBSCRIBED TO THE WITHIN INSTRUMENT, AND ACKNOWLEDGE  
THAT THEY EXECUTED THE SAME IN THEIR AUTHORIZED CAPACITY, AND THAT BY THEIR  
SIGNATURES ON THE INSTRUMENT THE PERSONS, OR THE ENTITY UPON BEHALF OF WHICH  
THE PERSONS ACTED, EXECUTED THE INSTRUMENT.

WITNESS MY HAND AND OFFICIAL SEAL

NOTARY PUBLIC

*Hurd Thornton*



## **EXHIBIT "A" TO MEMORANDUM OF TRUST**

### **SUMMARY OF TRUST POWERS**

- A) SELL, CONVEY, EXCHANGE, CONVERT, IMPROVE, REPAIR, PARTITION, DIVIDE, ALLOT, SUBDIVIDE, CREATE RESTRICTIONS, EASEMENTS, OR OTHER SERVITUDE THEREON, OPERATE AND CONTROL;
- B) LEASE FOR TERMS WITHIN OR BEYOND THE TERM OF ANY TRUST PROVIDED FOR IN THIS DECLARATION AND FOR ANY PURPOSE, INCLUDING EXPLORATION FOR AND REMOVAL OF GAS, OIL AND OTHER MINERALS;
- C) ENCUMBER OR HYPOTHECATE FOR ANY TRUST PURPOSE BY MORTGAGE, DEED OF TRUST, PLEDGE OR OTHERWISE;
- D) CARRY INSURANCE OF SUCH KINDS AND IN SUCH AMOUNTS AT THE EXPENSE OF THE TRUSTS PROVIDED FOR IN THIS DECLARATION AS THE TRUSTEE MAY DEEM ADVISABLE;
- E) COMMENCE OR DEFEND AT THE EXPENSE OF ANY TRUST PROVIDED FOR IN THIS DECLARATION SUCH LITIGATION WITH RESPECT TO ANY SUCH TRUST OR ANY PROPERTY OF THE TRUST ESTATE AS TRUSTEE MAY DEEM ADVISABLE.
- F) SO LONG AS THE ORIGINAL TRUSTEE OR TRUSTEES ARE MANAGING THE TRUST, THEY MAY INVEST AND REINVEST IN COMMON OR PREFERRED STOCKS, SECURITIES, INVESTMENT TRUSTS, BONDS AND OTHER PROPERTY, REAL OR PERSONAL, FOREIGN OR DOMESTIC, INCLUDING ANY UNDIVIDED INTEREST IN ANY ONE OR MORE COMMON TRUST FUNDS, WHETHER OR NOT SUCH INVESTMENTS BE OF THE CHARACTER PERMISSIBLE FOR INVESTMENTS BY FIDUCIARIES UNDER ANY APPLICABLE LAW;
- G) VOTE, BY PROXY OR OTHERWISE, IN SUCH MANNER AS TRUSTEE MAY DETERMINE TO BE IN THE BEST INTERESTS OF THE TRUST;
- H) PAY ANY ASSESSMENTS OR OTHER CHARGES LEVIED ON ANY STOCK OR OTHER SECURITY HELD BY TRUSTEE PURSUANT TO THIS DECLARATION;
- I) EXERCISE OR EXERCISE AS TRUSTEE MAY DEEM BEST ANY SUBSCRIPTION, CONVERSION OR OTHER RIGHTS OR OPTIONS;
- J) PARTICIPATE IN ANY PLANS OR PROCEEDINGS FOR THE FORECLOSURE, REORGANIZATION, CONSOLIDATION, MERGER OR LIQUIDATION OF ANY CORPORATION OR ORGANIZATION THAT HAS ISSUED SECURITIES HELD BY THE TRUSTEE OR WILL ISSUE SECURITIES TO BE HELD BY TRUSTEE IN TRUST;
- K) ENFORCE ANY MORTGAGE OR DEED OF TRUST OR PLEDGE BY TRUSTEE IN TRUST;
- L) COMPROMISE, SUBMIT TO ARBITRATION, RELEASE WITH OR WITHOUT CONSIDERATION AND OTHERWISE ADJUST ANY CLAIMS;
- M) DISTRIBUTE GIFTS OF UP TO \$10,000 PER YEAR PER DONEE OUT OF PRINCIPAL OR INTEREST OR IN ANY PROPORTION OF THE TWO THAT THE TRUSTEE, IN HIS SOLE DISCRETION, DEEMS ADVISABLE;



- N) INVEST IN AND GUARANTEE A BUSINESS OR TRUSTEE OF THE TRUST CAPITALIZING ON THE BUSINESS VENTURE;
- O) TAKE ALL SUCH PROCEEDINGS, AND EXERCISE ALL SUCH RIGHTS AND PRIVILEGES AS COULD BE DONE, TAKEN OR EXERCISED BY AN ABSOLUTE OWNER OF THE TRUST PROPERTY;
- P) SO LONG AS BOTH OF THE ORIGINAL TRUSTEES ARE SERVING AS TRUSTEES HEREUNDER, EITHER OF THEM SHALL HAVE THE POWER TO BIND THE TRUST IN ANY AND ALL TRANSACTIONS, INCLUDING, BUT NOT LIMITED TO (1) COLLECTING RECEIPTS; (2) PAYING DISBURSEMENTS; (3) SECURING ASSETS; (4) WRITING CHECKS AND MAKING WITHDRAWALS FROM BANK ACCOUNTS; AND (5) PURCHASING, SELLING AND PLEDGING SECURITIES AND OTHER PROPERTY;
- Q) THE TRUSTEE IS EMPOWERED TO BUY, SELL, TRADE AND DEAL IN OPTIONS, PRECIOUS METALS, STOCKS, BONDS AND SECURITIES OF ALL MATURE (INCLUDING "SHORT" SALES AND SPECULATIVE OPTION TRANSACTIONS;
- R) HE SUCCESSOR TRUSTEE HAS THE AUTHORITY TO ENTER THE SAFE DEPOSIT BOX IN TRUSTORS' NAMES, INDIVIDUALLY OR AS TRUSTEES OF THE TRUST, AND REMOVE THE CONTENTS THEREOF;
- S) THE TRUSTEE SHALL HAVE THE POWER TO BORROW MONEY FOR ANY TRUST PURPOSE (INCLUDING FROM THE PROBATE ESTATE FOR THE PURPOSE OF PAYING TAXES) ON SUCH TERMS AND CONDITIONS AS THE TRUSTEE MAY DEEM PROPER FROM ANY PERSON, FIRM OR CORPORATION;
- T) THE TRUSTEE IS AUTHORIZED TO LOAN OR ADVANCE TRUSTEE'S OWN FUNDS TO ANY TRUST PROVIDED FOR IN THIS DECLARATION FOR ANY TRUST PURPOSE AND TO CHARGE FOR SUCH LOAN OR ADVANCE TO THE TRUST;
- U) THE TRUSTEE IS AUTHORIZED TO PURCHASE SECURITIES OR OTHER PROPERTY FROM AND TO MAKE LOANS AND ADVANCEMENTS FROM THE PROBATE ESTATE WITH OR WITHOUT SECURITY TO THE EXECUTOR OR OTHER REPRESENTATIVE OF THE ESTATE OF EITHER TRUSTOR; AND
- V) THE TRUSTEE MAY HOLD SECURITIES OR OTHER PROPERTY HELD BY TRUSTEE IN TRUST PURSUANT TO THIS DECLARATION IN TRUSTEE'S NAME AS TRUSTEE UNDER THIS DECLARATION, IN TRUSTEE'S OWN NAME WITHOUT A DESIGNATION SHOWING IT TO BE TRUSTEE UNDER THIS DECLARATION, IN THE NAME OF TRUSTEE'S NOMINEE, OR THE TRUSTEE MAY HOLD SUCH SECURITIES UNREGISTERED IN SUCH CONDITION THAT OWNERSHIP WILL PASS BY DELIVERY;
- W) THE TRUSTEE HAS THE AUTHORITY TO EXECUTE ANY POWER OF ATTORNEY FORM FOR ANY ACCOUNT HELD IN TRUSTORS' NAMES IN ANY BANK;

FIRST AMENDMENT TO  
THE REVOCABLE TRUST OF  
MICHAEL S. CORNELL AND ARLIE M. CORNELL

This First Amendment to THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL, dated this 6<sup>th</sup> day of August, 2009, is made by Michael S. Cornell, as Surviving Grantor and Surviving Trustee of THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL and accepted and consented to by MICHAEL S. CORNELL, acting in his capacity as Surviving Grantor and Surviving Trustee, on this 6<sup>th</sup> day of August, 2009.

By agreement with the Trustees dated November 1, 1996, Grantors, Michael S. Cornell and Arlie M. Cornell created and placed into effect THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL; Arlie M. Cornell has passed leaving Michael S. Cornell as Surviving Grantor and Surviving Trustee; and as Surviving Grantor the said Michael S. Cornell desires to amend said trust agreement, and the Surviving Trustee is willing to accept and consent to such amendment.

NOW, THEREFORE, Surviving Grantor and Surviving Trustee agree as follows:

Article Nine Section 9.01 Trustees SECOND of THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL shall be amended to read as follows:

SECOND: At the death or incapacity of the undersigned, TONI C. JOHNSON shall act as Trustee/Successor Trustee. In the event that TONI C. JOHNSON is unavailable or unwilling to act, then in that event, JOHN HENRY CORNELL shall act as Trustee/Successor Trustee.

All other terms and provisions of THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL shall remain in full force and effect.

DATED this 6<sup>th</sup> day of August, 2009.

  
MICHAEL S. CORNELL  
Surviving Grantor

FIRST AMENDMENT TO THE REVOCABLE TRUST OF  
MICHAEL S. CORNELL AND ARLIE M. CORNELL  
Page 1 of 2

EXHIBIT B

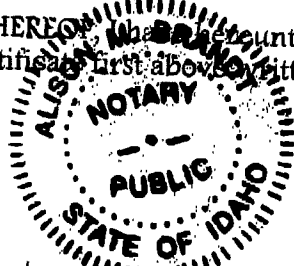
STATE OF IDAHO

County of Clearwater

) ss.

On this 6<sup>th</sup> day of August, 2009, before me, a notary public in and for the State of Idaho, personally appeared Michael S. Cornell, a single person, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Alison M. Brandt  
Notary Public in and for Idaho.  
Residing at: Orofino  
Commission Expires: 2-26-2010

ACCEPTED this 6<sup>th</sup> day of August, 2009.

Michael S. Cornell  
MICHAEL S. CORNELL  
Surviving Trustee

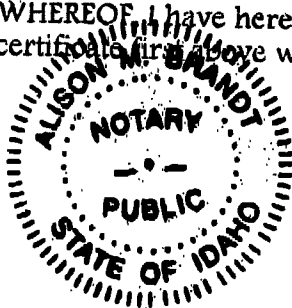
STATE OF IDAHO

County of Clearwater

) ss.

On this 6<sup>th</sup> day of August, 2009, before me, a notary public in and for the State of Idaho, personally appeared Michael S. Cornell, known or identified to me to be the person whose name is subscribed to the within instrument as Trustee for THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL, and acknowledged to me that he executed the same as such Trustee for THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Alison M. Brandt  
Notary Public in and for Idaho.  
Residing at: Orofino  
Commission Expires: 2-26-2010

FIRST AMENDMENT TO THE REVOCABLE TRUST OF  
MICHAEL S. CORNELL AND ARLIE M. CORNELL  
Page 2 of 2

**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813

Case No. 012-277  
Filed 9/17/12  
at 8:18 o'clock A M ✓  
Bernie Bird  
By BP Clerk  
Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )  
 )  
THE REVOCABLE FAMILY TRUST OF ) Case No. CV 2012-00277  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. ) **MOTION TO DISMISS**  
 )  
\_\_\_\_\_ )

Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and pursuant to I.R.C.P. 12(b), hereby moves this honorable Court for an order dismissing the Petition of the petitioner in the above-entitled action. The basis for this Motion is that the petitioner is now deceased and died without issue. Based thereon, all net income and principal remaining in the Trust Estate vest in Respondent by the express terms of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell.

This Motion is supported by the Affidavit filed herewith.

DATED this 14th day of September, 2012.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

MOTION TO DISMISS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MOTION TO DISMISS* was, this 14th day of September, 2012,

X hand-delivered by providing a  
copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
\_\_\_\_\_ mailed, postage pre-paid,  
by first class mail; or  
\_\_\_\_\_ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert



Karin Seubert  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813

Case No. CV 12-277  
Filed 9/17/12  
at 8:18 o'clock A M  
Karin Seubert Clerk  
By BP Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**NOTICE OF HEARING**

YOU WILL PLEASE TAKE NOTICE that Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C. will call up for hearing her *Motion to Dismiss* at the hour of 10:00 a.m. on October 1, 2012, before the Honorable Magistrate of the above Court

DATED this 14th day of September, 2012.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

CERTIFICATE OF SERVICE

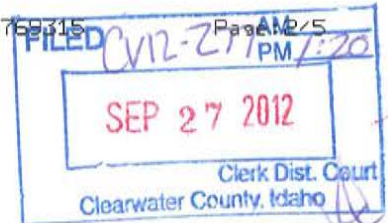
I HEREBY CERTIFY that a true and correct copy of the foregoing *NOTICE OF HEARING* was, this 14th day of September, 2012,

X hand-delivered by providing a  
copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
\_\_\_\_\_ mailed, postage pre-paid,  
by first class mail; or  
\_\_\_\_\_ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

MOTION TO VACATE RESPONDENT'S  
NOTICE OF HEARING ON MOTION TO  
DISMISS

COMES NOW Darrel W. Aherin of Aherin, Rice & Anegon, and moves the Court to vacate the hearing set by Respondent on her Motion to Dismiss.

A telephonic scheduling conference is currently set for that date and time in this matter. Counsel for Toni C. Johnson, Karin Seubert, represented to the Court a pre-trial conference was requested before any further matters should be scheduled.

Respondent has filed a motion seeking dismissal. The issue of the Petition for Supervised Administration and Removal of Trustee of Toni C. Johnson, is still pending.

Justice is served by the trustee providing a full accounting of the trust. Issues which need to be resolved are:

- (1) John H. Cornell has many creditors that are entitled to payment out of his share of the trust;

MOTION TO VACATE HEARING ON  
RESPONDENT'S MOTION TO DISMISS -- 1

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Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho



- (2) The Trust of Michael and Arlie Cornell owe Margaret Watkins over \$9,000 for a loan made by her to Michael Cornell; and
- (3) There is an issue that five acres of the real property is the separate property of John H. Cornell.

A hearing on Petitioner's Petition for Supervised Administration and Removal of Trustee should be set, simultaneously, during the telephonic scheduling conference currently set for October 1, 2012.

The undersigned needs additional time to respond to the Motion to Dismiss.

DATED this 27<sup>th</sup> day of September, 2012.

AHERIN, RICE & ANEGON

By Darrel W. Aherin  
Darrel W. Aherin  
Attorney for Petitioner

#### CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 27<sup>th</sup> day of September, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

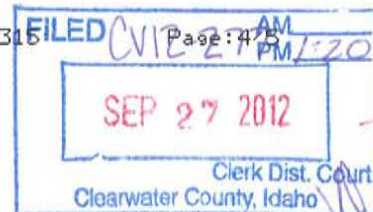
- ☐ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile  
☐ Federal Express

Darrel W. Aherin  
DARREL W. AHERIN

MOTION TO VACATE HEARING ON  
RESPONDENT'S MOTION TO DISMISS -- 2

N:\Cornell, John\Pleadings\Motion to Vacate Hearing on Motion to Dismiss.docx ser

Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

MOTION TO STRIKE AFFIDAVIT OF  
KARIN SEUBERT

COMES NOW Darrel W. Aherin of Aherin, Rice and Anegon, and hereby moves the  
Court for an order striking Paragraph 2 of the Affidavit of Karin Seubert.

Paragraph 2 of the Affidavit provides hearsay evidence and is not admissible.

Oral argument is requested.

DATED this 27<sup>th</sup> day of September, 2012.

AHERIN, RICE & ANEGON

By Darrel W. Aherin  
Darrel W. Aherin  
Attorney for Petitioner

MOTION TO STRIKE AFFIDAVIT OF  
KARIN SEUBERT -- 1

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Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 27<sup>th</sup> day of September, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile
- ☐ Federal Express

  
\_\_\_\_\_  
DARREL W. AHERIN

MOTION TO STRIKE AFFIDAVIT OF  
KARIN SEUBERT -- 2

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Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544



In The Matter Of  
Family Trust of  
Michael S. Cornell, and Arlie M Cornell etal.

Case No: CV-2012-0000277

**NOTICE OF SUMMARY JUDGEMENT  
HEARING**

**NOTICE IS HEREBY GIVEN** that the above-entitled case is hereby set for:

Hearing Scheduled  
Judge:  
Courtroom:

Tuesday, November 27, 2012 01:00 PM  
Randall W. Robinson  
Magistrate Courtroom

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on October 3rd, 2012.

DARREL W. AHERIN  
P.O. BOX 698 1212 IDAHO ST.  
LEWISTON ID 83501-0698

(208) 746-3650 ☒ Mailed ☐ Hand Delivered ☐ Faxed

KARIN SEUBERT  
P.O. BOX 854  
LEWISTON ID 83501

(208) 746-0962 ☒ Mailed ☐ Hand Delivered ☐ Faxed

Dated: October 3rd, 2012  
Carrie Bird  
Clerk Of The District Court

By:   
Deputy Clerk

DOC22ev 7/96



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

NOTICE OF DEPOSITION DUCES TECUM  
OF TONI JOHNSON

TO: TONI JOHNSON  
AND TO: KARIN SEUBERT, Attorney for Toni Johnson

**NOTICE IS HEREBY GIVEN** that the deposition testimony of TONI JOHNSON will be taken on oral examination before an official court reporter and notary public in and for the State of Idaho, or some other official authorized by law to administer oaths, at the date, time, and place herein set forth:

**DATE:** October 22, 2012  
**TIME:** 10:00 a.m.  
**PLACE:** Clearwater County Courthouse  
150 Michigan Avenue  
Orofino, Idaho

NOTICE OF DEPOSITION DUCES  
TECUM OF TONI JOHNSON -- 1  
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Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

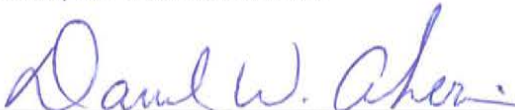
You are further commanded to bring with you at said time and place the following:

- 1) A complete inventory of ALL personal property of Michael S. Cornell and The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell as of the date of death of Michael S. Cornell on December 15, 2009; and
- 2) Copies of all bank statements of Michael S. Cornell, Arlie M. Cornell and The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell from October 15, 2009 to date.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure and shall be subject to continuance until completed.

DATED this 3<sup>rd</sup> day of October, 2012.

AHERIN, RICE & ANEGON

By   
Darrel W. Aherin  
Attorney for Petitioner

#### CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 3<sup>rd</sup> day of October, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile
- ☐ Federal Express

Keith Evans  
Court Reporter  
380 Clear Creek Road  
Kooskia, ID 83539

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Facsimile
- ☐ Federal Express

  
DARREL W. AHERIN

NOTICE OF DEPOSITION DUCES  
TECUM OF TONI JOHNSON -- 2

N:\Cornell, John\Pleadings\Notice of Deposition Toni Johnson.docx ser

Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho



Karin Seubert  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

MOTION TO SHORTEN TIME

COMES NOW Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and hereby moves the Court for an order shortening the time in which to have a hearing on the *Motion for Protective Order*.

This Motion is made on the basis that the deposition from which protection is sought is set for October 22, 2012.

DATED this 12 day of October, 2012.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

MOTION TO SHORTEN TIME

-1-

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MOTION TO SHORTEN TIME* was, this 12 day of October, 2012,

☒ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
by first class mail; or  
☐ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

By

Karin Seubert  
Karin Seubert



Karin Seubert  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

Case No. CV 2012-00277

**MOTION FOR PROTECTIVE ORDER**

Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and pursuant to I.R.C.P. 25(a)(1) and 26(c), hereby moves this honorable Court for an order protecting Respondent from *Notice of Deposition Duces Tecum of Toni Johnson* dated October 3, 2012 and attached hereto as Exhibit A.

This Motion is made on the basis that said deposition, if allowed to proceed as scheduled, would unreasonably subject Respondent to undue burden and expense, specifically incurring attorney's fees in preparing for and attending said deposition. As the record of the case reflects, Respondent filed a *Motion to Dismiss* on September 14, 2012 on the basis that Petitioner John H. Cornell's claim is extinguished by his death. It is set for summary judgment hearing on November 27, 2012. Counsel for John H. Cornell has twice confirmed Mr. John H. Cornell's death with this Court, thus said fact is not in dispute. Respondent is entitled to a decision on said *Motion to Dismiss* prior to incurring the expense and being subjected to deposition. Protecting Respondent from said

MOTION FOR PROTECTIVE ORDER

-1-

deposition until after the Court has ruled on the pending *Motion to Dismiss* does not prejudice Petitioner's claim because if dismissal is not granted, then Petitioner may pursue discovery at that time.

Additionally, Rule 25(a)(1) of the Idaho Rules of Civil Procedure allows dismissal of an action as to a deceased party if no substitution of parties is made within a reasonable time. Here, the record of the case reflects that Petitioner's attorney first informed the Court of Petitioner's death on August 21, 2012. No *Motion for Substitution of Parties* has been filed by a successor or representative of the deceased party. It is unreasonable and burdensome to subject Respondent to the expense and burden of deposition in the absence of entry of court order allowing substitution of a proper party to pursue Petitioner's claim. Further, the authority under which said *Notice of Deposition Duces Tecum of Toni Johnson* was signed is unknown.

For these reasons, Respondent requests entry of a court order protecting Respondent from said *Notice of Deposition Duces Tecum of Toni Johnson*.

Oral argument is requested.

DATED this 12 day of October, 2012.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MOTION FOR PROTECTIVE ORDER* was, this 12 day of October, 2012,

☒ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
by first class mail; or  
☐ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

**AHERIN, RICE & ANEGON**  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

**THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,**

**NO. CV 2012-00277**

**NOTICE OF DEPOSITION DUCES TECUM  
OF TONI JOHNSON**

**TO: TONI JOHNSON**  
**AND TO: KARIN SEUBERT, Attorney for Toni Johnson**

**NOTICE IS HEREBY GIVEN** that the deposition testimony of TONI JOHNSON will be taken on oral examination before an official court reporter and notary public in and for the State of Idaho, or some other official authorized by law to administer oaths, at the date, time, and place herein set forth:

**DATE: October 22, 2012**

**TIME: 10:00 a.m.**

**PLACE: Clearwater County Courthouse  
150 Michigan Avenue  
Orofino, Idaho**

**NOTICE OF DEPOSITION DUCES  
TECUM OF TONI JOHNSON -- 1**

N:\Cornell, John\Pleadings\Notice of Deposition Toni Johnson.docx ser

**Aherin, Rice & Anegon**  
Attorneys at Law  
Lewiston, Idaho

*Exhibit A*

You are further commanded to bring with you at said time and place the following:

- 1) A complete inventory of ALL personal property of Michael S. Cornell and The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell as of the date of death of Michael S. Cornell on December 15, 2009; and
- 2) Copies of all bank statements of Michael S. Cornell, Arlie M. Cornell and The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell from October 15, 2009 to date.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure and shall be subject to continuance until completed.

DATED this 3<sup>rd</sup> day of October, 2012.

AHERIN, RICE & ANEGON

By *Darrel W. Aherin*  
Darrel W. Aherin  
Attorney for Petitioner

#### CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 3<sup>rd</sup> day of October, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile
- ☐ Federal Express

Keith Evans  
Court Reporter  
380 Clear Creek Road  
Kooskia, ID 83539

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Facsimile
- ☐ Federal Express

*Darrel W. Aherin*  
DARREL W. AHERIN

NOTICE OF DEPOSITION DUCES  
TECUM OF TONI JOHNSON -- 2

N:\Cornell, John\Pleadings\Notice of Deposition Toni Johnson.docx ser

Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, AND FOR THE COUNTY OF IDAHO

IN THE MATTER OF	)	CASE NO. CV2012-277
	)	
MICHAEL S. CORNELL, ETAL	)	COURT MINUTES
	)	
	)	
	)	

---

Randall W. Robinson, Presiding Judge

Courtney Baker: Deputy Clerk

Other Parties Council: Darrel Aherin

Other Parties Council: Karin Seubert

Date: 10/17/2012 Time: 10:23 - 10:35 a.m. Tape: CD541-1

Subject of proceeding: Motion for protection of discovery

=====

FOOTAGE:

10:23 Honorable Randall W. Robinson, Magistrate Judge, presiding. Parties present in the court room: Mr. Aherin, and Ms. Seubert present telephonically.

10:23 Court addresses the Motion for Protection of Discovery.

10:24 Ms. Seubert states the Idaho code that needs to substitute someone if a party of the case passes away.

10:24 Court asks Mr. Aherin if there is a person to substitute for the Estate.

10:25 Mr. Aherin states that that is the problem that they are facing.

10:26 Ms. Seubert states it is unreasonable to subject her client to discovery at this time.

---

10:29 Mr. Aherin state's his opinion on requesting discovery.

10:34 Court states that that is the legal issue, the fiduciary duty.

10:34 Both attorneys agree that the issue of the case is whether there has been a breach of fiduciary duty.

10:35 Court will grant the order for protective order, but if there are any facts that

survive Mr. Ahern's clients death, the protective order will be terminated.

10:36 Court is in recess.



Karin Seubert  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

Case No. CV 2012-00277

**ORDER OF PROTECTION  
 FROM DISCOVERY**

The Court having reviewed Respondent's *Motion Protective Order* and good cause shown,  
 IT IS HEREBY ORDERED Respondent is hereby protected from the *Notice of Deposition Duces  
 Tecum of Toni Johnson* dated October 3, 2012 until such time as the Court enters a decision on the  
 pending *Motion to Dismiss*.

DATED this 17th day of October, 2012.

  
 JUDGE RANDALL ROBINSON

ORDER OF PROTECTION  
 FROM DISCOVERY



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *ORDER OF PROTECTION FROM DISCOVERY* was, this \_\_\_\_ day of October, 2012,

\_\_\_\_ hand-delivered by providing a  
copy to: Valley Messenger Service;  
\_\_\_\_ hand-delivered;  
\_\_\_\_ mailed, postage pre-paid,  
by first class mail; or  
\_\_\_\_ transmitted via facsimile

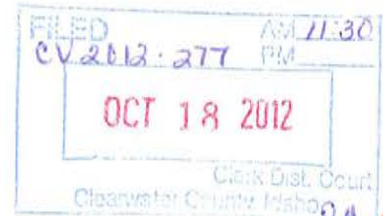
to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower and Callery, P.L.L.C.  
1304 Idaho St.  
P.O. Box 854  
Lewiston, ID 83501

By \_\_\_\_\_  
Clerk of Court

ORDER OF PROTECTION  
FROM DISCOVERY



AHERIN, RICE & ANEGON

Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorneys for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

RESPONSE TO MOTION FOR  
PROTECTIVE ORDER

COMES NOW Darrel W. Aherin of Aherin, Rice & Anegon, and responds to the Respondent's Motion for Protective Order as follows:

John Cornell began requesting copies of his parents Trust in August of 2010. It was not provided until October 29, 2010 when the undersigned requested it from attorney Allison Brandt.

Despite numerous requests, Toni C. Johnson, as alternate trustee, failed to provide an inventory of the property as of the death of Michael S. Cornell on December 15, 2009, the second to die of Arlie and Michael Cornell, or a full accounting which has been repeatedly requested. She provided random copies of bank statements and only select pages for the bank statements immediately following Michael Cornell's death. See Affidavit of Darrel W. Aherin.

A further issue that will need to be addressed is that John Cornell purchased Lot 34, Lakeview First Addition, from the trust for \$27,000 in 2002. He paid the road fees and water from 2002 until March of 2010. On January 3, 2007, John Cornell conveyed this lot back to the

RESPONSE TO MOTION FOR PROTECTIVE ORDER -- 1

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**Aherin, Rice & Anegon**

Attorneys at Law  
Lewiston, Idaho

Michael Cornell and Arlie M. Cornell Family Trust to protect the asset as he was contemplating divorce. This lot has now been included as part of the property being sold with the house.

Toni C. Johnson has breached her fiduciary duty to settle and distribute the trust in accordance with the terms of the trust.

The trust, Section 4.03 provides as follows:

On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: TONI C. JOHNSON AND JOHN H. CORNELL.

The assets of the Trust should have been distributed to Toni C. Johnson and John H. Cornell within a reasonable time after the death of Michael Cornell, not three years later and John Cornell committing suicide.


Toni C. Johnson has mismanaged The Trust in that she has used a substantial amount of the monies available to pay her personal expenses. No money has been distributed to John Henry Cornell. See the Affidavit of Darrel W. Aherin with attached undated handwritten partial accounting of Toni Johnson showing personal payments from trust funds and a later bank statement dated October 7, 2011 showing she was continuing to use trust funds for personal use.

John Cornell had no money to live on, Toni Johnson refused to provide him with any trust money that he was entitled to, John Cornell had to live with his aunt and was supported by his aunt. John Cornell owed money to his aunt for providing money to him because Toni Johnson refused to distribute the trust assets. Toni Johnson's conduct contributed to the death of John Cornell.

The undersigned first asked for an accounting on the trust money on November 5, 2010, to the attorney for the trust, Alison Brandt. Other than a few documents delivered by Alison Brandt on September 12, 2011, no accounting has been provided.

DATED this 17<sup>th</sup> day of October, 2012.

AHERIN, RICE & ANEGON

By   
Darrel W. Aherin  
Attorney for Petitioner

CERTIFICATE OF SERVICE

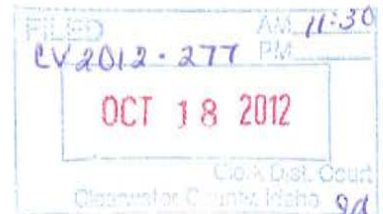
I, DARREL W. AHERIN, hereby certify that on the 17<sup>th</sup> day of October, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☒ Facsimile
- ☐ Federal Express

  
\_\_\_\_\_  
DARREL W. AHERIN





AHERIN, RICE & ANEGON

Darrel W. Aherin

1212 Idaho Street

P.O. Drawer 698

Lewiston, ID 83501-0698

(208) 746-3646

ISB# 1534

Attorneys for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

AFFIDAVIT OF DARREL W. AHERIN

I, DARREL W. AHERIN, being first duly sworn upon oath, depose and say:

1. I am over the age of 18 years and am otherwise competent to make this affidavit.

This affidavit is made upon personal knowledge setting forth facts I believe to be true.

2. Attached hereto are true and correct copies of the following documents:

- A. January 8, 2010 Wells Fargo Custom Checking, page 7 of 10;
- B. February 9, 2010 Wells Fargo Custom Checking, page 6 of 9;
- C. March 5, 2010 Wells Fargo statement, pages 2 of 9 and 6 of 9;
- D. Toni Johnson undated handwritten partial accounting; and
- E. October 7, 2011 Wells Fargo Checking statement.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

DARREL W. AHERIN

SUBSCRIBED AND SWORN to before me on this 17<sup>th</sup> day of October, 2012.



Shelley E. Rana  
Notary Public for Idaho  
Residing at Lewiston Idaho  
My commission expires on 5-21-2016

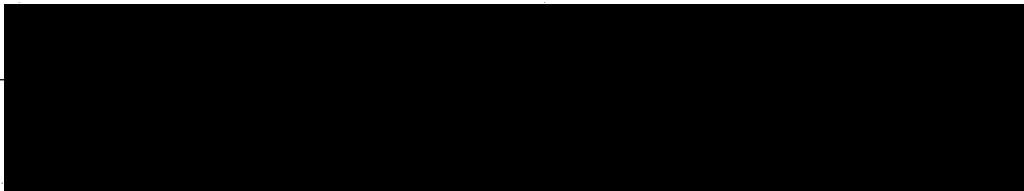
### CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 17<sup>th</sup> day of October, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile 746-9553
- ☐ Federal Express

Darrel W. Aherin  
DARREL W. AHERIN



## Wells Fargo Custom Checking®

### Activity summary

Balance on 12/8	18,453.22
Deposits/Additions	21,197.69
Withdrawals/Subtractions	- 0.00
<b>Balance on 1/8</b>	<b>\$39,650.91</b>

Account number [REDACTED]

**THE MICHAEL S CORNELL AND ARLIE  
MICHAEL S CORNELL TTE  
TONI C JOHNSON TTE**

Wells Fargo Bank, N.A., California (Member FDIC)

Questions about your account: **1-800-742-4932**

Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.

### Transaction history

Date	Description	Check No.	Deposits/ Additions	Withdrawals/ Subtractions	Ending Daily Balance
<b>Beginning balance on 12/8</b>					<b>18,453.22</b>
12/21	Deposit Made IN A Branch/Store		21,197.69		39,650.91
<b>Ending balance on 1/8</b>					<b>39,650.91</b>
<b>Totals</b>			<b>\$21,197.69</b>	<b>\$0.00</b>	



## Wells Fargo Custom Checkin

### Activity summary

Balance on 1/9	39,650.91
Deposits/Additions	0.00
Withdrawals/Subtractions	- 0.00
<b>Balance on 2/5</b>	<b>\$39,650.91</b>

THE MICHAEL S CORNELL AND ARLIE  
MICHAEL S CORNELL TTE  
TONI C JOHNSON TTE

Wells Fargo Bank, N.A., California (Member FDIC)

Questions about your account: **1-800-742-4932**

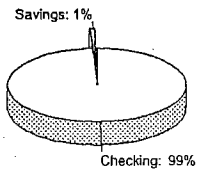
Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.



## PMA account

Percent of total	Balance last month (\$)	Balance this month (\$)	Increase/decrease (\$)	Percent change
18%	6,925.22	8,955.11	2,029.89	29.31%
81%	39,650.91	39,650.91	0.00	0.00%
<1%	479.30	479.35	0.05	0.01%
<b>Total assets</b>	<b>\$47,055.43</b>	<b>\$49,085.37</b>	<b>\$2,029.94</b>	<b>4.31%</b>

### Total asset allocation (by account type)



## Liabilities

Account (Account Number)	Percent of total	Outstanding balance last month (\$)	Outstanding balance this month (\$)	Increase/decrease (\$)	Percent change
Wells Fargo Credit Card † (5490-9624-9039-9265)	N/A	490.09	0.00	(490.09)	(100.00)%
<b>Total liabilities</b>		<b>\$490.09</b>	<b>\$0.00</b>	<b>(\$490.09)</b>	<b>(100.00)%</b>

† Refer to your statement for actual statement dates.

## Available credit

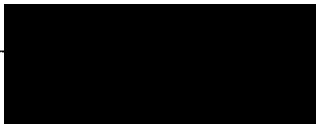
The information below may not be current. Be sure to verify the credit available on your accounts when accessing your credit lines.

Account	Approved credit line	Credit used	Credit available
Wells Fargo Credit Card (5490-9624-9039-9265)	16,400.00	0.00	16,400.00
<b>Total available credit</b>	<b>\$16,400.00</b>	<b>\$0.00</b>	<b>\$16,400.00</b>

## Interest, dividends and other income

The information below should not be used for tax planning purposes.

Account	This month	This year
PMA* Prime Checking Account (344380183)	0.69	2.18
Wells Fargo Money Market Savings™ (6860432969)	0.05	0.20
<b>Total interest, dividends and other income</b>	<b>\$0.74</b>	<b>\$2.38</b>



## Wells Fargo Custom Checking<sup>®</sup>

### Activity summary

Balance on 2/6	39,650.91
Deposits/Additions	0.00
Withdrawals/Subtractions	- 0.00
<b>Balance on 3/5</b>	<b>\$39,650.91</b>



THE MICHAEL S CORNELL AND ARLE  
MICHAEL S CORNELL TTE  
TONI C JOHNSON TTE

Wells Fargo Bank, N.A., California (Member FDIC)

Questions about your account: **1-800-742-4932**

Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.

ALISON JONES COMPANY 67501 Columbia Rd. Ch...

CK#	Name	Tax IRS	Maintenance	Household Utilities Bills	Totals
10614	El Power			16063	
10621	Altkman				12658
10620	Target				16989
10622	Wells Fargo			16871	
10630	Venison			4485	
10631	Allstate				7311
10655	El Power			15460	
10656	LK Water			10050	
10657	Altkman		7900		
10658	Target				12255
10661	Venison			4794	
10636	Allstate	7311			
10665	Wells Fargo			13398	
10674	Allstate				7311
10680	Wells Fargo				1150
10690	El Power			13234	
10691	LK Water			8383	
10697	Altkman		12476		
10697	Allstate				7955
10692	Target				8506
10703	Verizon			4330	
Debit	Dish Network		Double Bill?	13598	
10709	Allstate				7311
10721	Chambers Power			11388	
10718	Lake Water			8400	
10719	Lake Rd			13500	
10720	Altkmans				12778
10712	Dish		6799		
10727	Frontier			4319	
10725	Target				10922
10731	Dish		100		
10746	Lake Water			8895	
10748	Power Chambers			10794	
10747	Altkmans		8895		
10749	DMV Jeep				7200
10738	Allstate	7311			
10757	Target				18642
10762	Frontier			4242	

Approved by \_\_\_\_\_  
 Approved by \_\_\_\_\_

WILSON JONES COMPANY

STREET COMMUNITY

2009  
9-09

ending 00

CK#	Name	TAX TNS	Maintenance	House in Bills (Medical etc)	Utilities	Toni's P.O. #
10807	Costco			655		
10832	Costco					849
10832	Costco			3610		
10820	Leschub					6211
10436	Wells Fargo			42154		
10434	Blue Cross			17424		
10435	Verizon				4389	
10413	Commutation	8723				
10447	Allstate	7311				
10469	Cleanwater				19270	
10478	Atkinson			16009		
10471	Allstate			7955		
10467	Lakeview water				11055	
10477	Target			10965		
10479	Verizon				4389	
10495	Allstate					7311
10523	Lakeview water				10485	
10501	Cleanwater				26796	
10508	Atkinson			18653		
10509	Target					8833
10510	Verizon				4323	
10523	Wells Fargo			49009		
10542	Lakeview water				8633	
10548	Atkinson					13299
10549	Target					7666
10551	Verizon				4323	
10561	Allstate			7313		
10575	Lakeview water				8735	
10574	Lakeview Rd				13500	
10583	Atkinson			11003		
10576	Cl Power				18370	
10581	Target					7235
10585	Wells Fargo				6297	
10587	Verizon				4323	
10599	Allstate					7311
10600	Kinetic					1150
10610	Lakeview				7800	
10613	Lake Rd				13500	



CK# Name Tax  
 107108 Push  
 10773 Allstate  
 10786 Power Club  
 10784 Fullerton  
 10787 Allstate  
 10794 American  
 10795 Target  
 10797 Franklin  
 10808 Allstate  
 10809 Allstate  
 10822 C. Power  
 10823 Allstate  
 10824 Allstate  
 10825 Allstate  
 10828 Allstate  
 10829 Allstate  
 10837 Target  
 10836 Franklin  
 10850 Allstate  
 10845 Dial  
 10860 Allstate  
 10859 Allstate  
 10841 Allstate  
 10842 Target  
 10843 Allstate  
 10883 Allstate  
 10884 Allstate  
 10894 C. Power  
 10892 Fullerton  
 10897 Allstate  
 10859 Allstate  
 10903 Allstate  
 10914 Target

108365  
954

6871

11713  
8395

7313

108365  
954

4397

908

6871

10940  
8078  
13500

12824

32813

4636

10803

7311

6871

10815  
8905

8947

16711

4317

6871

14715  
715

12702

138448

8205

4317

© WILSON JONES COMPANY

67500 Comm-Fills @

MADE IN U.S.A.

1 2 3 4 5 6 7 8

CK#	Name	Tax Fns	Marriage	Household Bills Medical eq	Utilities	Toni's Personal
9/25/10	10807 Costco			655		
10/14/10	10832 Costco					849
10/14/10	10832 Costco			3610		
10/15/10	10820 Lessman					6211
11/2/09	10436 Wells Fargo	12/2/09		42154		
11/2/09	10434 Blue Cross			17424		
11/2/09	10435 Verizon				4389	
12/1/09	107813 Clearwater	87239 12/2/09				
12/1/09	10447 Allstate	7311				
12/1/09	10469 Clearwater				19270	
12/20/09	10478 Atkinson			16009		
12/16/09	10471 Allstate			7955		
12/13/09	10467 Lakeview				11055	
12/13/09	10477 Target			10965		
12/13/09	10479 Verizon				4389	
12/31/09	10495 Allstate					7311
1/4/10	10503 Lakeview				10485	
1/4/10	10504 Clearwater				26796	
1/20/10	10508 Atkinson			18653		
1/20/10	10509 Target					8833
1/21/10	10510 Verizon				4323	
1/24/10	10523 Wells Fargo			49009		
2/1/10	10542 Lakeview				8633	
2/20/10	10548 Atkinson					12299
2/20/10	10549 Target					7616
2/23/10	10551 Verizon				4323	
2/28/10	10561 Allstate			7313		
3/1/10	10575 Lakeview				8738	
3/1/10	10574 Lakeview				13500	
3/1/10	10583 Atkinson			16033		
3/1/10	10576 Allstate				18370	
3/20/10	10584 Target					7235
3/20/10	10585 Wells Fargo				6299	
3/23/10	10587 Verizon				4323	
3/31/10	10599 Allstate					7311
3/31/10	10600 Kinetics					1152
4/1/10	10612 Lakeview				7800	
4/1/10	10613 Lakeview				13500	



1	2	3	4	5	6	7	8
CK#	Name	Tax INS	Maintenance	Home Bills Medical Sec	Utilities	Tolls	
8/2/10	10708 Doh				6899		1
9/9/10	10773 Allstate					7313	2
9/10/10	10786 Doherty				11713		3
9/10/10	10784 Doherty				8395		4
9/10/10	10787 Alkinson			12325			5
9/10/10	10794 Americas			954			6
9/10/10	10795 Target					9088	7
9/10/10	10799 Frontier				4397		8
9/26/10	10808 Allstate	7311					9
9/26/10	10809 Doh			6899			10
10/7/10	10822 C. Power				10940		11
10/7/10	10823 Lakeview				8078		12
10/17/10	10823 Lakeview				13500		13
10/17/10	10825 Allstate					12824	14
9/17/10	10828 Americas Trs				32813		15
10/1/10	10837 Target					10800	16
10/18/10	10836 Frontier				4626		17
11/1/10	10850 Allstate					7311	18
10/29/10	10845 Doh			6899			19
11/2/10	10860 Christian Power				10875		20
11/2/10	10859 Lakeview				8925		21
11/2/10	10861 Alkinson			8947			22
11/2/10	10872 Target					16797	23
11/2/10	10873 Frontier				4317		24
11/2/10	10883 Doh			6899			25
12/1/10	10884 Allstate	7311					26
12/1/10	10894 C. Power				14795		27
12/1/10	10892 Lakeview				7995		28
12/1/10	10897 Alkinson						29
12/1/10	10904 Allstate					8205	30
12/1/10	10914 Frontier			4317			31
12/1/10	10914 Frontier						32
12/1/10	10914 Frontier						33
12/1/10	10914 Frontier						34
12/1/10	10914 Frontier						35
12/1/10	10914 Frontier						36
12/1/10	10914 Frontier						37
12/1/10	10914 Frontier						38
12/1/10	10914 Frontier						39
12/1/10	10914 Frontier						40



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1	2	3	4	5	6	7	8
CK#	Name	Tax INS	Majorance	Household Bills Medicaid	Utilities	Toni's Personal	
4/13/10	0614	CI Power			16063		
4/28/10	0621	AKinson				12658	
4/28/10	0620	Target				16989	
4/30/10	0622	Wells Fargo			6699		
4/24/10	0630	Verizon			4485		
	0637	Allstate ?				7311	
5/15/10	0655	CI Power			15460		
5/15/10	0656	LK water			10050		
5/18/10	0657	AKinson		7900			
5/18/10	0658	Target				13255	
5/22/10	0664	Verizon			4794		
4/30/10	0636	Allstate	7311				
5/22/10	0665	Wells Fargo			13378		
6/1/10	0676	Allstate				7311	
6/1/10	0680	Wells Fargo				1150	
6/1/10	0690	CI Power			13234		
6/4/10	0691	LK water			8333		
6/20/10	0697	AKinson		12476			
6/4/10	0687	Allstate				7955	
6/4/10	0692	Target				8506	
6/25/10	0703	Verizon			4330		
6/25/10	0709	Dishwater	Double Billed ?		13598		
7/2/10	0709	Allstate				7311	
7/15/10	0721	Quantum Power			11388		
7/14/10	0718	Lake water			8400		
7/14/10	0719	Lake Rd			13500		
7/14/10	0720	AKinson				12778	
7/1/10	0712	Dish		6799			
7/23/10	0727	Jordan phone			4319		
7/20/10	0725	target				10922	
7/25/10	0731	Dish		100			
8/7/10	0746	Lake water			8895		
8/7/10	0748	Power Quantum			10794		
8/7/10	0747	AKinson		8895			
8/7/10	0749	Drav Jeep				7200	
8/31/10	0738	Allstate	7311				
8/17/10	0757	Target				18642	
8/10/10	0762	Jordan phone			4242		

Prepared By	Initials	Date
Approved By		

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1	2	3	4	5	6	7	8
CK #	Name	Tax FNS	Maintenance	Household Bills Medical	Utilities	Toni's Personal	
3/26/10 10595	Becky's	95.00					
2/28/10 208300	St Tax	271.00	3/29/10				
3/1/10	Cash			6.51			
2/23/10 10482	Matt Graham		80.00				
2/28/10 10488	Wells Fargo			45.00			
2/28/10 2080100	Valley Springs Death Cert. Copy			12.40			
3/1/10	Cash			190.32			
3/1/10	USPO			385			
3/29/10 10632	NAPA Brakes					154.51	
3/30/10 10637	Stone Records			32.85			
4/6/10	Debit		73.25				
4/6/10	10644		60.00				
4/13/10	Debit		25.42				
5/24/10	Cash		60.00				
5/24/10	10660		57.24				
5/24/10	Cash			10.50			
5/24/10	10694		45.00	6/14/10			
5/24/10	10694			1883.00			
5/24/10	10694			125.00	5/4/10		
5/24/10	10694			1500.00			
5/24/10	10694			17.21			
5/24/10	Debit Card					677.83	Auto
5/24/10	Debit			5.50			
5/24/10	Debit		28.07				
5/24/10	Cash			11.24			
5/24/10	CK					17.21	Postage
5/24/10	Cash			10.00			
5/24/10	Debit					9.31	
7/14/10 10717	Costco					13.79	Vitamin
7/14/10 10717	Costco			27.28			
6/14/10 10684	Costco		47.05				
8/10/10 10762	Hays		11.09				
8/13/10 10753	NAPA oil					9.52	
8/13/10	Cash			9.91			
8/13/10 10761	Costco					24.98	
8/13/10	Costco		8/17/10	16.37			
8/13/10	Country Store					9.39	
8/24/10 10767	Country Store			5.84			
9/25/10 10807	Wal-Mart					18.78	

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Account number [REDACTED] September 9, 2011 - October 7, 2011 ■ Page 1 of 5



MICHAEL S CORNELL  
TONI C JOHNSON  
5319 LAKEVIEW RD  
OROFINO ID 83544-6127

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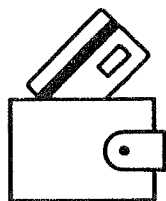
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Online Statements	<input type="checkbox"/>	Auto Transfer/Payment	<input type="checkbox"/>
Mobile Banking	<input type="checkbox"/>	Overdraft Protection	<input checked="" type="checkbox"/>
My Spending Report	<input checked="" type="checkbox"/>	Debit Card	<input type="checkbox"/>
		Overdraft Service	<input type="checkbox"/>



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### Activity summary

Beginning balance on 9/9	\$1,622.46
Deposits/Additions	1,871.04
Withdrawals/Subtractions	- 1,970.87
<b>Ending balance on 10/7</b>	<b>\$1,522.63</b>

Account number [REDACTED]

MICHAEL S CORNELL

TONI C JOHNSON

California account terms and conditions apply

For Direct Deposit [REDACTED] payments use

Routing Number [REDACTED]

### Overdraft Protection

Your account is linked to the following for Overdraft Protection:

■ Credit Card [REDACTED]

### Interest summary

Interest paid this statement	\$0.04
Average collected balance	\$1,160.54
Annual percentage yield earned	0.04%
Interest earned this statement period	\$0.04
Interest paid this year	\$0.58

### Transaction history

Date	Check Number	Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending daily balance
9/9	11161	Check		124.59	
9/9	11158	Check		40.28	
9/9	11157	Check		25.00	1,432.59
9/12	11151	Check		121.00	
9/12	^11152	Kinecta Fcu Check Pymt 11152		100.00	
9/12	11135	Check		54.87	
9/12	11162	Check		2.85	1,153.87
9/13	11155	Check		141.15	
9/13	11160	Check		16.50	996.22
9/15	11165	Check		49.02	
9/15	11163	Check		2.85	944.35
9/19	11164	Check		38.48	905.87
9/20	11154	Check		113.71	792.16
9/21	11168	Check		85.00	707.16
9/22	^11167	Target Bank Checkpymt 110922 11167 00001496318		125.63	
9/22	11120	Check		53.27	
9/22	11126	Check		52.22	
9/22	11171	Check		49.70	
9/22	11169	Check		9.35	416.99
9/23	11170	Check		18.98	398.01

## Transaction history (continued)

Date	Check Number	Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending daily balance
9/26		Tele-Transfer Fr Savings xxxxxx8663 Reference # Tfe58H9Yjn	100.00		498.01
9/27	^11172	Frontier 13 Arc Bill Pymt 110926 11172 0000000301251003906656		42.76	
9/27	^11166	Amerigas Propane Checkpymt 092611 11166 5491082660		10.60	444.65
9/28		Tele-Transfer Fr Savings xxxxxx8663 Reference # Tfetjv5Jtm	1,500.00		
9/28		Check Crd Purchase 09/27 Orofino Builders Suppl Orofino ID 434256xxxxxx9288 271140012375516 ?McC=5211 90		3.48	1,941.17
9/29	11174	Check		50.61	1,890.56
9/30	11175	Check		39.75	
9/30	11176	Check		16.84	
9/30	11173	Check		5.00	1,828.97
10/4	11177	Check		121.00	
10/4	11178	Check		76.15	1,631.82
10/5		Tele-Transfer Fr Savings xxxxxx8663 Reference # Tfejtr92R	271.00		
10/5	11185	Check		118.91	
10/5	11186	Check		75.00	
10/5	^11179	Dish Network Bill Pymt 111004 11179 *****3655		73.99	1,634.92
10/6	11180	Check		46.25	
10/6	11190	Check		38.65	
10/6	11187	Check		11.65	1,538.37
10/7	11191	Check		15.78	
10/7		Interest Payment	0.04		1,522.63
Ending balance on 10/7					1,522.63
Totals			\$1,871.04	\$1,970.87	

The Ending Daily Balance does not reflect any pending withdrawals or holds on deposited funds that may have been outstanding on your account when your transactions posted. If you had insufficient available funds when a transaction posted, fees may have been assessed.

^ **Converted check:** Check converted to an electronic format by your payee or designated representative. Checks converted to electronic format cannot be returned, copied or imaged.

## Summary of checks written (checks listed are also displayed in the preceding Transaction history)

Number	Date	Amount	Number	Date	Amount	Number	Date	Amount
11120	9/22	53.27	11163	9/15	2.85	11175	9/30	39.75
11126 *	9/22	52.22	11164	9/19	38.48	11176	9/30	16.84
11135 *	9/12	54.87	11165	9/15	49.02	11177	10/4	121.00
11151 *	9/12	121.00	11166	9/27	10.60	11178	10/4	76.15
11152	9/12	100.00	11167	9/22	125.63	11179	10/5	73.99
11154 *	9/20	113.71	11168	9/21	85.00	11180	10/6	46.25
11155	9/13	141.15	11169	9/22	9.35	11185 *	10/5	118.91
11157 *	9/9	25.00	11170	9/23	18.98	11186	10/5	75.00
11158	9/9	40.28	11171	9/22	49.70	11187	10/6	11.65
11160 *	9/13	16.50	11172	9/27	42.76	11190 *	10/6	38.65
11161	9/9	124.59	11173	9/30	5.00	11191	10/7	15.78
11162	9/12	2.85	11174	9/29	50.61			

\* Gap in check sequence.



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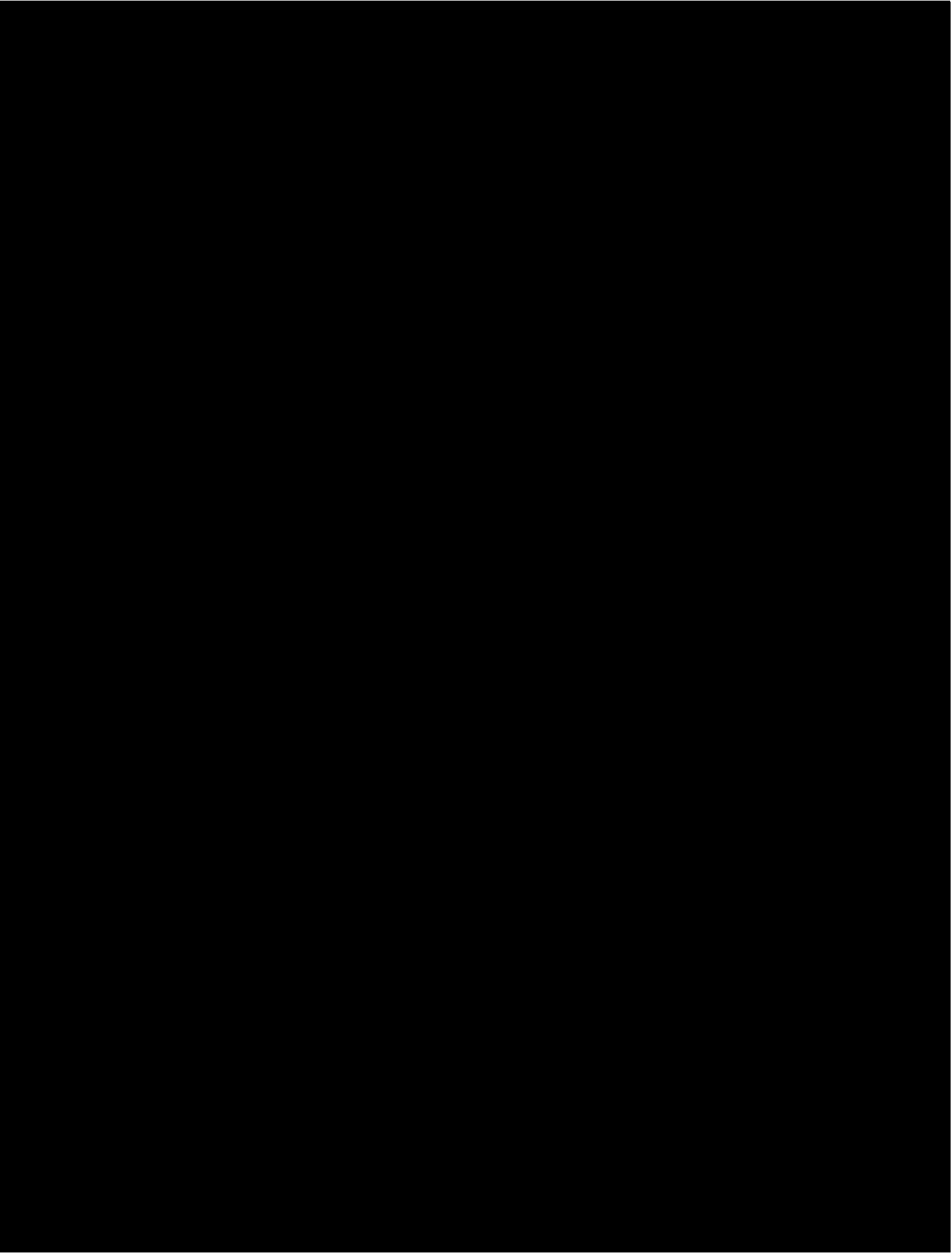
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201  
202

203  
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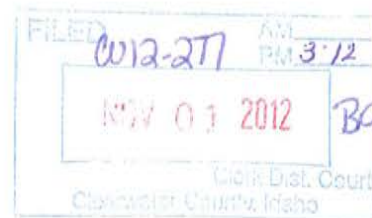








**Karin Seubert**  
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Attorneys at Law  
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208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**MEMORANDUM OF LAW**

Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., hereby submits this *Memorandum of Law* in support of Respondent's *Motion to Dismiss* dated September 14, 2012. Said *Motion* is set for hearing on November 27, 2012.

**I. FACTS AND PROCEDURAL BACKGROUND**

Michael S. Cornell and Arlie M. Cornell established the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell on November 1, 1996. See Exhibit A to *Affidavit of Karin Seubert* dated September 14, 2012 (hereinafter "Trust"). Through said trust, Mr. and Mrs. Cornell named their two children, Toni C. Johnson and John H. Cornell, as the beneficiaries of the trust upon Mr. and Mrs. Cornell's deaths. *Id.* at § 4.03. On August 6, 2009, Michael S. Cornell as surviving grantor and trustee named Toni C. Johnson as sole trustee/successor trustee.

*Id.* at Exh. B.

Arlie M. Cornell died on November 9, 2008 and Michael S. Cornell died on December 15, 2009. See *Petition for Supervised Administration and Removal of Trustee*, ¶ 2.

John H. Cornell died on or around August 20, 2011 leaving no issue. See *Affidavit of Karin Seubert* dated September 14, 2012.

Respondent Toni C. Johnson seeks dismissal of said action on the basis that John H. Cornell's claim was extinguished by his death and that all net income and principal remaining in the Trust Estate vest in Respondent by the express terms of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell. See Trust at § 4.03(a).

Petitioner's counsel objects to said dismissal and argues that the claim for breach of fiduciary duty survives Petitioner's death and may be pursued by his estate. No substitution of parties has been made to date in compliance of Rule 25(a)(1) of the Idaho Rules of Civil Procedure, but Petitioner's counsel has represented to the Court that said request for substitution will be forthcoming before the hearing on Respondent's *Motion to Dismiss*.

## **II. ARGUMENT**

### **A. Summary Judgment Standard**

The parties and the Court have agreed in open court that Respondent's *Motion to Dismiss* shall be treated as a request for summary judgment because it relies upon facts outside of the pleading, specifically the death of Petitioner after the filing of this lawsuit.

Summary judgment must be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The party seeking summary judgment has the initial burden of proving an absence of a genuine issue

of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All facts and reasonable inferences will be considered in favor of the non-moving party. *Summers v. Cambridge Joint School Dist. No. 432*, 139 Idaho 953, 955, 88 P.3d 772, 774 (2004).

However, the non-moving party cannot “rest upon the mere allegations or denials of that party’s pleadings, but the party’s response ... must set forth specific facts showing that there is a genuine issue for trial.” *Shere v. Pocatello Schoo Dist. No 25*, 143 Idaho 486, 489-90, 148 P.3d 1232, 1235-36 (citing I.R.C.P. 56(c)). As explained below, there are no genuine issues of material facts to preclude dismissal being granted in light of John H. Cornell’s death.

**B. Respondent is entitled to dismissal as a matter of law.**

Based on the express terms of the trust, all net income and principal remaining in the Trust Estate vest in Respondent as the sole surviving beneficiary upon the death of John H. Cornell with no surviving issue of John H. Cornell. See Trust at § 4.03(a).

The question then becomes whether John Cornell’s claims of breach of fiduciary duty survive his death. The Idaho Supreme Court recently discussed the applicable law relating to abatement of a litigant’s claim upon his or death in the context of a legal malpractice claim as follows:

The abatement rule holds that in the absence of a legislative enactment addressing the survivability of a claim, the common law rules govern. See I.C. § 73-116 (“The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.”); see also *Evans v. Twin Falls Cnty.*, 118 Idaho 210, 215, 796 P.2d 87, 92 (1990). Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate. See *Helgeson v. Powell*, 54 Idaho 667, 674-79, 34 P.2d 957, 960-61 (1934); *Kloepfer v. Forch*, 32 Idaho 415, 417-18, 184 P. 477, 448, 915 P.2d 6, 10 (1996).

*Bishop v. Owens*, 152 Idaho 616, 620-21, 272 P.3d 1247, 1251-52 (2012).

It is a settled principle of Idaho law that an action for breach of fiduciary duty sounds in tort. *See Rockefeller v. Grabow*, 136 Idaho 637, 644 39 P.3d 577, 584 (2001) (citing *Property Management West Inc. v. Hunt*, 126 Idaho 897, 899-900, 894 P.2d 130, 132-33 (1995)). Therefore, in the absence of a statute addressing the survivability of the decedent's claim, John Cornell's claims of breach of fiduciary duty abated upon his death and must be dismissed.

The statutory section that governs the survivability of negligence claims is Idaho Code Section 5-327(2). Said statute was amended in 2010 with the amendment taking effect on July 1, 2010, so a two-part analysis is needed to properly consider Mr. Cornell's claim.

First, in its earlier form in effect prior to July 1, 2010 read as follows:

Causes of action arising out of injury to the person or property, or death, caused by the wrongful act or negligence of another, except actions for slander or libel, shall not abate upon the *death of the wrongdoer*, and each injured person or the personal representative of each one meeting death, as above stated, shall have a cause of action against the personal representative of the wrongdoer; provided, however, the punitive damages or exemplary damages shall not be awarded nor penalties adjudged in any such action; provided, however, that the injured person shall not recover judgment except upon some competent, satisfactory evidence corroborating the testimony of said injured person regarding negligence and proximate cause.

I.C. § 5-327 (through July 1, 2010) (emphasis added).

Said language makes clear that said survivability applied only after the death of the wrongdoer, not the death of the injured party as the subsequent amendment addressed. Because the amendment to Idaho Code Section 5-327(2) was not retroactive, so said amendment applied only to actions which arose on or after the statute's effective date. *See Bishop*, 152 Idaho at 620, 272 P.3d at 1251. Therefore, the statute in its original form applies from the death of Michael S. Cornell on December 15, 2009 until July 1, 2010. Applying the facts in the light most favorable to the non-moving party, John Cornell would be the injured party if his allegations are proven at

trial and Toni Johnson is the wrongdoer in this case. Because the alleged “injured party” is the decedent as opposed to the “wrongdoer,” any claims of John Cornell that may have arisen between December 15, 2009 and July 1, 2010 were extinguished by his death and must be dismissed.

For the second part of the analysis, one must consider the amendments to said statute, which divided said statute into two subsections, the second of which is applicable here and reads in relevant part as follows:

A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii), other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence.

I.C. § 5-327 (eff. July 1, 2010).

The tort of breach of fiduciary duty is neither an “action for personal injury” (“personal injury” being defined in Idaho Code Section 6-1601(7) as “a physical injury, sickness or death suffered by an individual”) nor an action for “property damage” as it does not involve tangible property that was allegedly damaged as is the common and ordinary meaning of the phrase “property damage.” As such, this action falls outside of the amended Idaho Code Section 5-327(2) and the general common law principles govern. In applying the general rule that tort actions abate upon the injured party’s death, the claims of John Cornell that may have arisen between July 1, 2010 and his death on August 20, 2012 were extinguished by his death and must be dismissed.

### **III. CONCLUSION**

Based on the foregoing, Respondent Toni Johnson respectfully requests that her Motion

to Dimiss be granted and that John Cornell's *Petition* be dismissed with prejudice.

DATED this 31st day of October, 2012.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

CERTIFICATE OF SERVICE

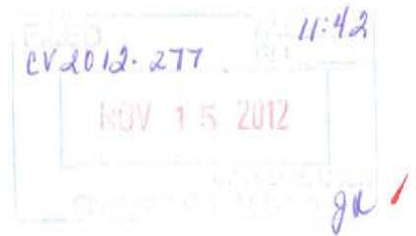
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to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert



AHERIN, RICE & ANEGON

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P.O. Drawer 698

Lewiston, ID 83501-0698

(208) 746-3646

ISB# 1534

Attorneys for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

RESPONSE TO RESPONDENT'S MOTION  
TO DISMISS

COMES NOW the attorney for the petitioner, Darrel W. Aherin of Aherin, Rice & Anegon, and responds to the Respondent's Motion to Dismiss.

BACKGROUND

This case heading refers to Michael S. Cornell and Arlie M. Cornell. They created the Revocable Family Trust involved in this case. They are the parents of John Cornell and Toni Johnson. The following is a timeline:

2002 – John Cornell purchased Lot 34, Lakeview First Addition, from his parents

March 21, 2005 – Michael and Arlie Cornell quitclaimed their property to the Cornell Trust

January 3, 2007 – John Cornell quitclaimed Lot 34 to the Cornell Trust

November 9, 2008 – Arlie Cornell passed away

August 6, 2009 – Michael Cornell signed the First Amendment to the Cornell Trust

December 15, 2009 – Michael Cornell passed away

August 20, 2012 – John Cornell committed suicide

The parties are designated John Cornell, petitioner, and Toni Johnson, respondent.

RESPONSE TO MOTION TO DISMISS -- 1

N:\Cornell, John\Pleadings\Response to Motion to Dismiss.docx ser

**Aherin, Rice & Anegon**

Attorneys at Law

Lewiston, Idaho



## ARGUMENT

In respondent's Memorandum of Law, respondent argues that the petitioner, John Cornell's, claim of breach of fiduciary duty abated upon his death and must be dismissed. Respondent argues that a breach of fiduciary duty, a claim that sounds in tort, abates upon the death of the injured person pursuant to common law principles and that Idaho Code Sections 5-237(2) and 6-1601(7) do not create survivability to the petitioner's claims. The respondent's argument first fails because the respondent's breach of fiduciary duty began on the date of Michael S. Cornell's death, the surviving grantor and trustee of the Michael S. Cornell and Arlie M. Cornell Trust, and continues until present. Additionally, the respondent has failed to address petitioner's breach of trust claim set forth in the Petition for Supervised Administration and Removal of Trustee, hereinafter referred to as the "Petition". A breach of trust claim is a claim based on the terms of a trust, and, thus, sounds in contract law rather than tort.

- A. The petitioner's claims of breach of fiduciary duty for failure to manage the monies of The Trust and failure to follow the fiduciary requirements of determining and distributing the net income and principal of the Trust proceeds pursuant to the terms of Trust survive his death on August 20, 2012 since the respondent's alleged wrongful conduct continued until petitioner's death.

The Petition sets forth in paragraphs 7, 9, 10, and 11 the alleged breach of fiduciary duty by the respondent for failing to provide an inventory of the trust assets when a reasonable request was made by a beneficiary as required by Idaho Code Section 15-7-303<sup>1</sup>, using trust assets for personal expenses and not managing the assets with the standard observed by a prudent person in dealing with another's property as set forth in Idaho Code Section 15-7-302, and failure to distribute and follow the terms of the Trust and distribute the net income and principal to the petitioner pursuant to the Idaho Code Sections 68-10-103, 68-10-201, and 68-10-202.

---

<sup>1</sup> 15-7-303. Duty to inform and account to beneficiaries.

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration. In addition:

(a) Within thirty (30) days after his acceptance of the trust, the trustee shall inform in writing the current beneficiaries and if possible, one (1) or more persons who under section 15-1-403 of this code may represent beneficiaries with future interests, of the court in which the trust is registered and of his name and address.

(b) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect his interest and with relevant information about the assets of the trust and the particulars relating to the administration.

(c) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.

The various breaches of respondent's fiduciary duty as trustee to the Trust occurred from the date of Michael S. Cornell's death on December 15, 2009 and continue. As alleged by the petitioner's Petition and the Affidavit of Margaret M. Watkins, the respondent controlled the assets of the Trust to her benefit. First, the respondent failed to provide a copy of the Trust instrument or provide information to the petitioner as to the assets of the Trust despite the petitioner requesting such information from the respondent and the respondent's former counsel, Alison Brandt of Orofino, Idaho. The petitioner's letters are attached to the Affidavit of Darrel W. Aherin. Petitioner wrote three letters dated August 1, 2010, August 20, 2010, and September 17, 2010. The only correspondence that the petitioner received from the respondent and her former counsel was a letter dated April 26, 2010, filed previously in this case, threatening a restraining order against the petitioner. Petitioner's written requests occurred after July 1, 2010.

Second, the respondent used funds from the Trust to pay for her own personal expenses as evidenced by her own ledger, including her own medical expenses, diet program, automobile insurance and repair, automobile tires, her cell phone bill, her Dish television subscription, and her personal shopping sprees at Target from November 2009 to December 2011. Additionally, Wells Fargo bank statements holding the Trust funds, also attached to the Affidavit of Darrel W. Aherin, also evidence that the respondent used funds for such personal expenses. Such use of funds is improper and in violation of Idaho Code 15-7-302 since the respondent used Trust funds, part of which belong to the petitioner as a beneficiary, in a way that is not consistent with the standards of a prudent person dealing with another person's property. Idaho Code 15-7-302 states as follows:

15-7-302. Trustee's standard of care and performance.

Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent man dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special skills or expertise, he is under a duty to use those skills.

Finally, the respondent failed to follow the terms of the Trust and distribute the net income and principal to the petitioner pursuant to Idaho Code Sections 68-10-103, 68-10-201, and 68-10-202. Those statutes are set forth as follows:

68-10-103. Fiduciary duties - General principles.

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of parts 2 and 3 of this chapter, a fiduciary:

(1) Shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter;

(2) May administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this chapter, and no inference that the fiduciary has improperly exercised the discretion arises from the fact that the fiduciary has made an allocation contrary to a provision of this chapter;

(3) Shall administer a trust or estate in accordance with this chapter if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) Shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust and this chapter do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising the power to adjust under section 68-10-104(a), Idaho Code, or a discretionary power of administration regarding a matter within the scope of this chapter, whether granted by the terms of a trust, a will, or this chapter, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one (1) or more of the beneficiaries.

A determination in accordance with this chapter is presumed to be fair and reasonable to all of the beneficiaries.

68-10-201. Determination and distribution of net income.

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in parts 3 through 5 of this chapter which apply to trustees and the rules in subsection (5) of this section. The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in parts 3 through 5 of this chapter which apply to trustees and by:

(A) Including in net income all income from property used to discharge liabilities;

(B) Paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) Paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) A fiduciary shall distribute to a beneficiary who receives a pecuniary amount outright the interest or any other amount provided by the will, the terms of the trust, or applicable law from net income determined under subsection (2) of this section or from principal to the extent that net income is insufficient. If a beneficiary is to receive a pecuniary amount outright from a trust after an income interest ends and no interest or other amount is provided for by the terms of the trust or applicable law, the fiduciary shall distribute the interest or other amount to which the beneficiary would be entitled under applicable law if the pecuniary amount were required to be paid under a will.

(4) A fiduciary shall distribute the net income remaining after distributions required by subsection (3) of this section in the manner described in section 68-10-202, Idaho Code, to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in subsection (1) of this section because of a payment described in section 68-10-501 or 68-10-502, Idaho Code, to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for

amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed. (2001)

68-10-202. Distribution to residuary and remainder beneficiaries.

(a) Each beneficiary described in section 68-10-201(4), Idaho Code, is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date. If a fiduciary makes more than one (1) distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

According to Article Four, Section 4.01 of the Trust, "On the death of the Trustor last to die, herein called "Surviving Trustor" the principal of the Trust and any accrued or undistributed net income from the Trust shall go to the successor Trustee and the Trustee shall apply and distribute

the net income and principal of the Trust Estate as set forth herein.” Furthermore, Section 4.03 states, “On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: TONI C. JOHNSON and JOHN H. CORNELL.” The respondent, Toni C. Johnson, who was the successor trustee, breached her fiduciary duty to abide by the terms of the Trust and distribute the income and principal of Trust equally to its beneficiaries after Michael C. Cornell’s death. Michael C. Cornell passed away on December 15, 2009 and the petitioner and beneficiary of the Trust, John H. Cornell, passed away on August 20, 2012. From the date of her father’s death to the present, the successor trustee respondent has failed to distribute the trust to the petitioner or petitioner’s estate. Thus, there has been an ongoing breach from July 1, 2010.

This Response has referred to July 1, 2010 in the above paragraphs because the respondent is arguing that the prior language of Idaho Code Section 5- 327, in effect until July 1, 2010, does not change the common law rule that tort actions involving breach of fiduciary duty do not survive the death of the injured party. Even if petitioner is correct that Section 5-327 in its prior form applies to events prior to July 1, 2010, it is clear from the exhibits attached to Affidavit of Darrel W. Aherin and previous exhibits filed herein that breaches of Ms. Johnson’s fiduciary duty continued from July 1, 2010 until the petitioner’s death.

Also, the respondent argues that the current form of Section 5-327 does not apply because this case does not involve a property damage case and relies on Section 6-1601(8)’s definition of property damage. Section 6-1601 also provides definitions for economic loss and noneconomic loss. Subsection 3 provides,

“Economic damages” means objectively verifiable monetary loss, including, but not limited to, out-of-pocket expenses, loss of earnings, loss of use of property, cost of replacement or repair, cost of obtaining substitute domestic services, loss of employment, medical expenses, or loss of business or employment opportunities. Idaho Code Section 6-1601(3).

Subsection 5, provides,

“Noneconomic damages” means subjective, nonmonetary losses including, but not limited to, pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party; emotional distress; loss of society and companionship; loss

of consortium; or destruction or impairment of the parent-child relationship. Idaho Code Section 6-1601(5).

The petitioner's damages clearly do not fall under the definition of noneconomic damages and it is a stretch to call his injury an economic damage since the petitioner did not claim a consequential loss of employment or medical expenses. Rather, the petitioner claimed in his Petition that he has suffered a direct loss as result of the destruction of his interest in the Trust property by respondent's above-described mismanagement, as well as her failure to distribute to him his share. The petitioner is not arguing a loss of earnings, use of his property, cost or repair or replacement, loss of wages or medical expenses. The petitioner stated in his Petition that his property, held in the Trust, has been depleted, damaged and mismanaged by the respondent. This is property damage, and thus, the petitioner's claim of breach of fiduciary duty survives his death.

- B. A breach of the trust terms occurred when the First Amendment to the Revocable Trust of Michael S. Cornell and Arlie M. Cornell was executed on August 6, 2009 in violation of Section 1.06 of the Trust, when the respondent failed to divide the net income and principal remaining in the Trust as required by Section 4.03 of the Trust, and the respondent failed to render an accounting as required by Section 8.02 of the Trust.

In her Memorandum of Law, respondent argues that the petitioner's claims sound in tort. However, it is clear from the petitioner's Petition that he claims breach of trust, as well as a breach of a fiduciary duty. According to Idaho Law, *Cruzen v. Boise City*, 58 Idaho 406, 74 P.2d 1037 (1937), the Supreme Court of Idaho held that a breach of trust is not based upon a statute but rather based on the obligation resting on every trustee to fulfill and comply with terms of a trust. *Id.*, at 415, 74 P.2d at 1048. The Court continued that a breach of trust is an action upon a contractual obligation. *Id.*, at 416, 74 P.2d at 1049. Since a breach of trust sounds in contract, then even under common law, a claim of breach of trust would survive the death of the claimant. See *Bishop v. Owens*, 152 Idaho 616, 619, 272 P.3d 1247, 1250 (2012).

In this case, the respondent, Toni C. Johnson, breached the trust in three different ways. The respondent breached the Trust when she encouraged Michael C. Cornell to execute the First Amendment to the Revocable Trust of Michael C. Cornell and Arlie M. Cornell on August 6, 2009, which changed Article Nine Section 9.01 to state that Toni C. Johnson and John Henry Cornell are no longer co-successor trustees. The amendment stated, "At the death or incapacity

of the undersigned (Michael C. Cornell) Toni C. Johnson shall act as a Trustee/Successor Trustee.” Parentheses added. This amendment allowed the respondent to control the assets of the Trust and to commit further breaches of the terms of trust set forth below. The amendment of the Trust agreement violated Section 1.06 of Article One of the Trust. The trust states “At any time during the joint lives of the Trustors, jointly as to community property and individually as to his or her own separate property, Trustors may, by duly executed instrument; (a) Amend this trust agreement (including his technical provisions) in any manner and/or b) Revoke this trust agreement in part or in whole, in which latter event any and all trust properties shall forthwith revert to such trustor free of trust.” Michael C. Cornell amended said Trust, removing the petitioner as a co-trustee in violation of the agreement since Arlie M. Cornell had already passed and the language of Section 1.06 clearly states that amendment and ratification can occur only during the joint lives of the Trustors.

In addition to amending the Trust, the respondent failed to divide the trust income and principal remaining in the Trust into two equal shares and distribute them to herself and her brother, petitioner, John H. Cornell. Said failure is a breach of the trust term in Section 4.03 that specifically states that “On the death of the surviving trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into (2) equal shares and distribute them to the following beneficiaries: Toni C. Johnson and John H. Cornell.” To date, the respondent has failed to distribute any assets of the Trust, has listed the real property of the Trust at an unreasonably high sale price, has used the funds for herself and failed to distribute any kind of income to the petitioner and has in fact actually demanded the petitioner turn over \$3,000.00 to her for a death claim from Michael C. Cornell’s International Brotherhood of the Electrical Workers Benefit Fund. As stated in the affidavit of Margaret M. Watkins, when the respondent discovered that the petitioner received a \$3,000.00 benefit from the Workers Benefit Fund, she demanded that it be turned over to her. The petitioner sent the respondent a check for \$2,500.00 and the petitioner kept \$500.00 for his living expenses.

Also, the respondent has failed to abide by and has breached the trust terms of Article Eight, Section 8.02 regarding periodic accounting. In Section 8.02, “After the deaths of both Trustors, the Trustees shall render an accounting from time to time but not less frequently than annually after any prior accounting regarding the transactions of any trust created in this



instrument.” Section 8.02 provides the procedures which a trustee must follow in delivering a written accounting to each beneficiary. The petitioner requested in writing an accounting on three different occasions as stated earlier in this response. The respondent has only provided an incomplete handwritten ledger which indicates the respondent used the Trust for her own personal benefit.

Therefore, there remain genuine issues of material facts which preclude dismissal. This case cannot be dismissed upon grounds that John H. Cornell has passed away. Clearly, Section 5-327 of the Idaho Code permits the petitioner’s estate to claim breach of fiduciary duty as petitioner’s property was damaged due to mismanagement and no statute or common law principles prevents the petitioner’s estate from pursuing a cause of action for breach of trust, which sound in contract rather than tort. Further, it is a settled matter of law that a breach of a fiduciary duty is different than an action of breach of trust. See *Pikering vs. El Jay Equipment Co., Inc.*, 108 Idaho 512, 517, 700 P.2d 134, 139 (App. 1985). Thus, the petitioner’s claims of breach of trust do not abate upon his death and, at a minimum, should be treated as breach of contract, which under the common law principle survives the death of an injured party.

#### CONCLUSION

Toni Johnson is seeking to obtain money for herself when her fiduciary duties required her to divide the money between two beneficiaries and distribute it. Toni Johnson is seeking a huge financial gain because she intentionally withheld trust distribution to the other beneficiary by refusing to distribute the assets for nearly three years. Toni Johnson was living individually off the trust. The trust was to be divided one-half to each. John Cornell’s estate is entitled to one-half of the trust measured as of the date of death of Michael S. Cornell.

DATED this 13th day of November, 2012.

AHERIN, RICE & ANEGON

By 

Darrel W. Aherin  
Attorney for Petitioner

# CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 13th day of November, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Facsimile
- ☐ Federal Express

  
\_\_\_\_\_  
DARREL W. AHERIN

AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorneys for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

AFFIDAVIT OF MARGARET M. WATKINS

I, MARGARET M. WATKINS, being first duly sworn upon oath, depose and say:

1. I am over the age of 18 years and am otherwise competent to make this affidavit.

This affidavit is made upon personal knowledge setting forth facts I believe to be true.

2. I am the aunt of John H. Cornell and Toni Johnson. My sister was Arlie M. Cornell.

3. John Cornell lived with me from April through September of 2010 and again from December of 2011 until his death on August 20, 2012.

4. John was the beneficiary under his father's International Brotherhood of Electrical Workers Benefit Fund. He was entitled to payment of \$3,000 for the death claim. When Toni found out he received this money, she demanded he turn it over to her. He had used \$500 for living expenses, but sent Toni a check for \$2,500. John could really have used that \$2,500 to get by. As part of John's records is the letter from the Pension Benefit Fund and the refund check to Toni, see attached.

5. In April 2010, while John was living with me, he tried getting information from Toni about the trusts, requesting copies of the trust documents, etc. Toni refused to talk to him. As part of John's records was a letter from the trust attorney, Alison Brandt, stating if he continued to try to contact Toni or tried to come on the property, they would get a restraining order against him. A poor copy of that letter is attached.

6. In May of 2010, John Cornell's doctors at Centennial Hills Hospital, Las Vegas, Nevada, felt he needed emergency treatment at a rehabilitation and pain control program at Mission Hospital in Laguna Beach, California due to his traumatic brain injury. I requested that Toni Johnson advance funds to John, which John was entitled to as a beneficiary of the trust, for John to receive this treatment and she refused. Due to Toni's refusal to advance any money to John, my sister had to put the expenses for this treatment on her credit card.

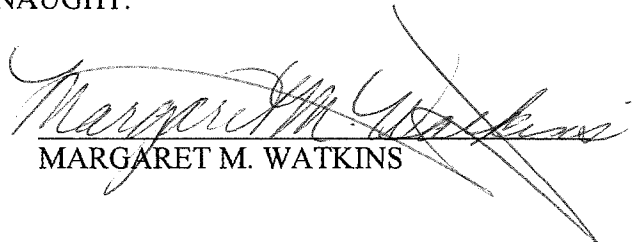
7. Both John and Toni told me that their parents had a medical savings account, but this was not included as part of the assets of the trust.

8. The circumstances surrounding John's death can be partially attributed to his inability to afford proper medical help he desperately needed. After John's death, I visited with Dr. Hopper, John's neuropsychologist, and he told us that John was supposed to see him once a week, but only came in approximately once a month. Prior to John's death, he told me he was tired of asking me for money for his doctor and other living expenses.

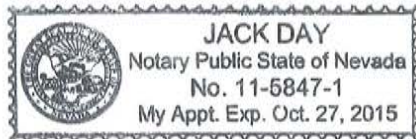
9. John needed sleep apnea testing, colonoscopy and pain management for his brain injuries, previous broken back and neck injuries and several neurological tests. He suffered with PTSD. His extremely high blood pressure sent him to the emergency room and urgent care several times. We were told he needed to be on high blood pressure medication called Propranolol because his high blood pressure was caused by the brain not the heart.

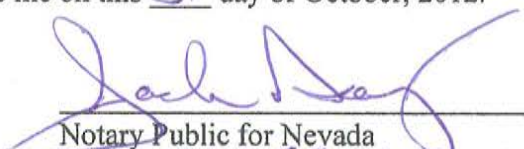
10. I strongly believe John's death, in part, can be attributed to the extreme stress and disturbing situation with his sister and the trust.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

  
MARGARET M. WATKINS

SUBSCRIBED AND SWORN to before me on this 31 day of October, 2012.



  
Notary Public for Nevada

Residing at 6955 N. DURANGO STE 1115

My commission expires on OCT 27, 2015

LV-NV. 89149

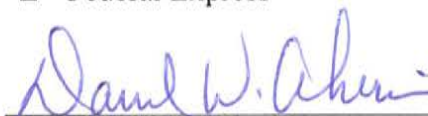


CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 13<sup>th</sup> day of November, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Facsimile 746-9553
- ☐ Federal Express



DARREL W. AHERIN

**ALISON M. BRANDT**  
**ATTORNEY AT LAW**

320 Michigan Avenue  
 P.O. Box 2482  
 Orofino, Idaho 83544  
 Phone (208) 476-7212  
 Fax (208) 476-4642

April 26, 2010

John Cornell  
 339 W. Highway 30  
 Burley, Idaho 83318

Re: Michael S. Cornell and Arlie M. Cornell Revocable Trust

Dear John:

Please accept my condolences on the loss of your father. He was a very kind man and I am sure he will be greatly missed.

I met with your sister, Ms. Toni Johnson, regarding the distribution of the Michael S. Cornell and Arlie M. Cornell Revocable Trust before I received your message. As you know, Ms. Johnson is the Successor Trustee of your parents' trust and you and Ms. Johnson are the sole beneficiaries.

Ms. Johnson is fully aware that she has a fiduciary obligation to the trust estate. Trusts are created to ensure that trust assets are managed appropriately while trust administration takes place. This means that assets cannot be wasted, trust debts must be paid, and assets will be distributed to the beneficiaries as practicably as possible considering all circumstances.

It is my understanding that the main asset of your parents' trust is the real property and that this real property will need to be sold. The real estate market from a seller's standpoint in Orofino is not good. There was a time when homes such as your parents' were selling for very high prices but that is no longer the case.

In any event, Ms. Johnson will be speaking with a realtor and placing the home on the market. I anticipate that a sale, for a reasonable price, will not occur quickly. Hopefully, I am wrong.

While we wait for a buyer for the home there are many monthly expenses associated with the subdivision in which your parents' home is located that Ms. Johnson will need to pay from the trust bank account funds. She will further use the funds minimally to do any necessary repairs that the realtor may suggest to improve the home's sale potential.

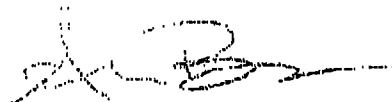
PAGE 1 OF 2

Currently, Ms. Johnson feels pressure from you to liquidate the assets of the trust and disperse the money immediately. Due to circumstances at this time, Ms. Johnson cannot fulfill her fiduciary obligation as Successor Trustee and liquidate the assets as you wish. Undue pressure and publicity from you will only further strain your relationship and may cause Ms. Johnson to seek a restraining order from the court to stop any and all harassment on your part.

Please be advised that Ms. Johnson is doing everything she can to get the trust assets distributed as quickly as possible, all within her responsibilities and obligations as set forth in the Idaho Statutes.

Ms. Johnson would prefer that your communication be through me, so if you would like to be updated on her progress please do not hesitate to write to me and advise me of such. I can let you know what price the realtor suggests to place on your parents' home, if there are offers on the home, and how trust assets, if any, are being distributed to help pay the real property expenses, etc.

Sincerely,



Sharon Johnson

Attest: Sharon Johnson

Page 2 of 2





**TRUST FOR THE  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS'  
PENSION BENEFIT FUND**

900 Seventh Street, NW • Washington, DC 20001 • (202) 831-7000

Edwin D. Hill  
Trustee

Lindell K. Lee  
Trustee

January 21, 2010

John H. Cornell  
339 West Hwy  
Burley, ID 83318

**Re: Death Claim for Michael S. Cornell  
Card No. D74143**

Dear Mr. Cornell:

Under separate cover a check will be sent to you as beneficiary for \$3,000.00 representing payment of the death claim for Michael S. Cornell. Plan provisions of the IBEW Pension Benefit Fund require that the pension payments of Brother Cornell be discontinued the first month following his death.

Please accept my deepest sympathy in your bereavement

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Lindell K. Lee".

Lindell K. Lee  
Trustee

LKL  
Copy to IBEW Local Union 0011  
Claim #: 2207403



11:42  
cv2012-277  
NOV 15 2012  
ja

AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorneys for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

AFFIDAVIT OF DARREL W. AHERIN

I, DARREL W. AHERIN, being first duly sworn upon oath, depose and say:

1. I am over the age of 18 years and am otherwise competent to make this affidavit.

This affidavit is made upon personal knowledge setting forth facts I believe to be true.

2. Attached hereto are true and correct copies of the following documents:

- A. A copy of John Cornell's letter to Alison Brandt dated August 1, 2010;
- B. A copy of John Cornell's letter to Alison Brandt dated August 20, 2010;
- C. A copy of John Cornell's letter to your affiant dated August 27, 2010;
- D. A copy of John Cornell's letter to Alison Brandt dated September 17,

2010;

E. A copy of Wells Fargo Overview of PMA account for the period February 6, 2010 to March 5, 2010.

F. A copy of Wells Fargo PMA Checking bank statement for the period September 9, 2010 to October 7, 2010;

AFFIDAVIT OF DARREL W. AHERIN -- 1  
N:\Cornell, John\Pleadings\Affidavit of DWA 11-12-12.docx ser

**Aherin, Rice & Anegon**  
Attorneys at Law  
Lewiston, Idaho

G. A copy of Wells Fargo PMA Checking bank statement for the period October 8, 2010 to November 5, 2010;

H. A copy of Wells Fargo Complete Advantage Checking bank statement for the period January 8, 2011 to February 7, 2011;

I. A copy of Wells Fargo Complete Advantage Checking bank statement for the period May 7, 2011 to June 7, 2011;

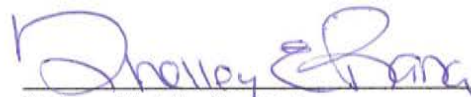
J. A copy of Wells Fargo Complete Advantage Checking bank statement for the period September 9, 2011 to October 7, 2011;

FURTHER YOUR AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
DARREL W. AHERIN

SUBSCRIBED AND SWORN to before me on this 13<sup>th</sup> day of November, 2012.



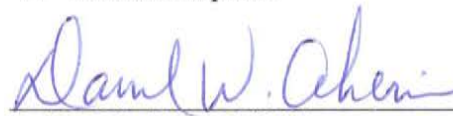
  
\_\_\_\_\_  
Notary Public for Idaho  
Residing at Lewiston, Idaho  
My commission expires on 5-21-2016

#### CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 13<sup>th</sup> day of November, 2012, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Facsimile 746-9553
- ☐ Federal Express

  
\_\_\_\_\_  
DARREL W. AHERIN

Dear Ms. Alison Brandt

8/1/2010

This letter is being written to you to  
Request a copy of my Parents, Michael and  
Arlie Cornell's Trust.

The reason I am requesting a copy is because  
I have not been informed of the details of  
the estate. I have never received or been given  
the opportunity to read or review the Will/Trust.  
I have absolutely no details regarding the assets  
of the estate. I am concerned about my property  
which is adjacent to my parents property.

How is the property is being handled? I would  
appreciate notification and details of the listing  
if and when the properties are listed. Has the  
property been listed for sale?

Since I have already waited for the information  
and it has not been given to me by my sister,  
I am hopeful you will send to me the requested  
information immediately.

EXHIBIT A

Page 1 of 4 Pages

Thank you, John Cornell



Ms Brandt, on behalf  
of Toni you sent me a letter  
requesting that I do not have  
any contact with Toni.  
Because of this request I am sending  
my letter to Toni to you. Please  
forward to Toni.

Ms Brandt 8/2/10

8/1/2010

Toni

I would like to take a moment to tell you I know you suffer the loss of both of our parents, especially so close together. I also suffer from their loss.

I know and feel the pain greatly.

Since I am unable to talk to you in person I am asking you in writing for a copy of our parents will/Trust. I need to know what it says and where I stand

your Brother, John

EXHIBIT APage 3 of 4 Pages

Please send all Correspondence  
to my Cousin's  
Address:

Robert Jones  
7309 Rustic Crest Street  
Las Vegas NV 89149

8/1/2010

CROSSROADS STATION  
LAS VEGAS, Nevada  
891304001  
3148830094-0097  
08/02/2010 02:16:27 PM

Sales Receipt  
Product Sale Unit Final  
Description Qty Price Price

OROFINO ID 83544 \$0.81  
Zone 5 First-Class  
Letter  
1.20 oz.  
Expected Delivery: Thu 08/05/10  
Return Rpt (Green Card) \$2.30  
Certified \$2.80  
Label #: 70101060000022215739  
Issue PVI: \$5.71

Total: \$5.71

Paid by:  
Debit Card \$5.71  
Account #: XXXXXXXXXXXX1317  
Approval #: 171381  
Trans: 2390  
Rece: 5/1

7010 1060 0000 2221 5739

OROFINO ID 83544

Zone 5 First-Class Letter	\$0.81	0094
1.20 oz.	\$2.00	12
Expected Delivery: Thu 08/05/10	\$2.80	
Return Rpt (Green Card)	\$0.00	
Certified	\$5.71	08/02/2010

Alison Brundt  
320 Michigan Ave.  
P.O. Box 2482 Orofino Idaho 83544

EXHIBIT



August 20, 2010

Second Request by mail Registered

Three Telephone Requests

No Return Call - No Response by Mail

Alison M. Brandt, Esq.  
125 Johnson Avenue  
Kendrick, Idaho 83537  
(208) 476-7212

Ms. Alison Brandt,

This letter is being written to you to request a copy of my parent's, Michael and Arlie Cornell's Trust.

The reason I am requesting a copy is because I have not been informed of the details of the estate. My sister Toni Johnson has refused my requests for a copy of my parent's Trust. My sister refuses to discuss any details of the Trust with me. I have never received or been given the opportunity to read or review the Will/Trust. I have absolutely no details regarding the assets of the estate. I am concerned about my personal property which is adjacent to my parent's property. How is the property I own being handled? I would appreciate notification and details of the listing if and when the properties are listed. Has the property been listed for sale? It is my understanding by law the details of the estate are to be discussed with me before action is taken in any way regarding the estate.

Since I have already waited for the information and it has not been given to me by my sister and the letter I sent to you, after checking with the USPS tracking information regarding the Registered Return Receipt Letter, I was informed the letter has been sitting in your Post Office Box in Orofino, Idaho unclaimed for

EXHIBIT B

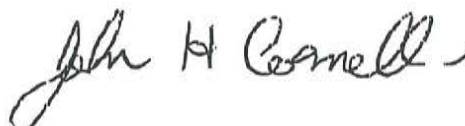
Page 1 of 4 Pages

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fifteen days. I am hopeful you will receive this second Registered Return Receipt Letter at your Kendrick, Idaho address and send to me the requested information immediately.

Please contact me if you have any questions or concerns.

Sincerely,



John H. Cornell

7309 Rustic Crest Street

Las Vegas, Nevada 89149

(702) 685 6721

**Please Note:** The address and telephone number given to you (above) is my Cousin's home. Please send all correspondence to this address. For telephone contact messages please leave your name and number with Robert or Catherine Jones and I will return your call. Thank you.

EXHIBIT B

Page 2 of 4 Pages

August 20, 20

This is my second attempt to have this letter forwarded to you by your attorney Alison Brandt.

Toni,

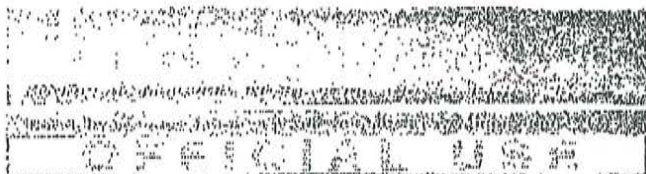
I would like to take a moment to tell you I know you suffer the loss of both of our parents, especially so close together. I also suffer from their loss. I know and feel the pain greatly. I would like to talk to you I know this is not an option. I am sorry you felt the need to take the actions you have taken. Since I am unable to talk to you in person I am asking you in writing for a copy of our parents Will/Trust I need to know what is says and where I stand.

Your brother,



EXHIBIT B  
Page 3 of 4 Pages

7000 1060 2000 2231 5746



Postage: 2.80  
 Priority Mail: 2.30  
 Postmark: None

Alison M. Brandt, Esq.  
 125 Johnson Avenue  
 Kendrick, Idaho 83531

CITY STOP VII LLC  
 7591 CIMARRON RD  
 LAS VEGAS, NV, 89131 8159  
 314885-8001

08/19/2010 11:34:38 AM

----- Sales Receipt -----

Product	Sale	Final
Description	Qty	Price
1st Letter	1	\$0.61
(Domestic)		
(KENDRICK, ID 83537)		
(Weight: 0.16 1.10 02)		
Certified	1	\$2.80
Return Rpt	1	\$2.30
Total		\$5.71

Debit Card \$5.71

Thank you!

Bill#: 1 13744 1 1469000-2

Clerk: CAT

All sales final on clamps and postage.

SHELL  
 7591 CIMARRON ROAD  
 LAS VEGAS NV 89129  
 03004126757

08/19/2010 11:35:06 AM  
 Register: 3 Trans #: 2679 Up ID: 1111  
 Your cashier: Post

POSTAGE \$5.71  
 Subtotal = \$5.71  
 Tax = \$0.00  
 Total = \$5.71  
 Change Due = \$0.00

Debit \$5.71

XXXXXXXXXXXX6818, Debit  
 INVOICE 033461  
 AUTH 350113  
 PINUsed

Pick up a brochure and card inside, then  
 apply at [www.ShellSaverCard.com](http://www.ShellSaverCard.com).

Use the Shell Saver Card to save 2  
 cents/gal on every fuel purchase!

THANK YOU COME AGAIN

EXHIBIT B

Page 4 of 4 Pages



August 27, 2010

Dear Mr. Ahern,

The following highlights a few of my concerns regarding my parent's estate.

There have been several attempts to obtain a copy of my parent's trust from my sister Toni C. Johnson and my parent's attorney Ms. Alison M. Brandt. On 08/07/2010 and 08/19/2010, I sent letters to Ms. Brandt and to my sister. I sent my letter to Toni in care of Ms. Brandt, by Registered mail with a request for a signed Return Receipt. There has been no response. Upon checking with the Postal Service I was informed that Ms. Brandt had not picked up my first letter from her P.O. Box for fifteen days and the letter sent to her Kendrick Idaho address was also denied. I have tried several times to contact Ms. Brandt by telephone messages and my calls were not returned. My sister has denied me a copy of my parent's Trust and she requested Ms. Brandt send to me a letter threatening to place a restraining order on me and stating I was not to contact my sister in any way. The letter also stated to only contact Toni through her attorney Ms. Brandt and Ms. Brandt will not accept my letters or telephone calls???

First, I am very concerned about my parent's ashes. They are at the house and I would like to have a service for my parent's or some type of memorial.

My concerns are the Listing of my parent's property without my input or consent. Please review the attached information that I found by calling our original Real Estate agent and searching the internet. I was never informed the property was listed.

My personal property that is adjacent to my parent's property, Lot 37, that I purchased from my father for \$27,000.00 in 2002. I have paid road fees and water from 2002 to March 2010. I put my property into my father's name when I married to protect my asset and left the property in my father's name for tax purposes.

This property has been combined into the listing of my parent's property. I am concerned how I will be compensated when the property is sold. I am concerned the house is listed too high

EXHIBIT C

Page 1 of 3 Pages

making it impossible to sell. I believe the value of the property is around \$300,000.00 to \$350,000.00. I also believe it is listed high so my sister can remain in the house.

My concern is regarding the handling of my parent's accounts. I am aware of an Annuity Account, Savings Accounts (Wells Fargo-Dorfin), Medical Saving Account, Retirement Benefits, possible Death Benefits and a Safe Deposit Box. A three thousand dollar check was sent to me by my father's IBEW Electrical Union after his death. I told my sister I received the check which was intended for me. She was upset and requested that I immediately send to her the money for my father's cremation. I sent her \$2800.00 instead \$3000.00 because the other \$200.00 I used for food. I am on unemployment and my wife is on disability from her work due to severe leg circulation issues. I have filed for long term disability for severe physical and brain injuries. My Neurologist and Neuropsychologist are certain I will be awarded SSD. My sister denied my Aunt's request for money for my emergency hospital expenses, medicine, co-pays and the plane fare necessary to admit me to Mission Hospital in California.

When my father died I was told by my sister my father only had \$20,000.00. I became suspicious when my father's good friend and neighbor told me my father told him of the aforementioned accounts.

There are items I would like to have of my parent's and my sister would not discuss with me the sharing of these items. Certain items were promised to me. The items have little value but are sentimental. There is a lifetime of items in the house and I would like a few things. When I would try and discuss the items or clean out and organize my sister would go into a crying fit telling me she had to have control and she just could not deal with anything. I tried to understand and give her time but she was unwilling to cooperate. I was willing to give her almost everything and even told her the trees on my land could be sold if she needed monetary help in the future and she was still unwilling to work with me. I became extremely frustrated when my sister had Ms. Brandt send to me a letter threatening a Restraining Order. I was very ill and the stress of everything put me into a complete tail spin. I was admitted into the Emergency Room and later transferred to a hospital in California. I remember our last telephone conversation was extremely emotional due to Ms. Brandt's letter and I screamed obscenities at my sister over the telephone that I later learned she recorded and played for others to hear. I was very angry to be threatened and I am sorry I became so angered. I do not know if a legal Restraining Order has been filed.

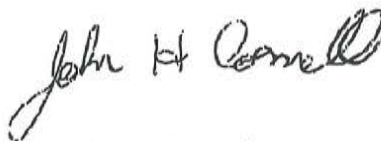
Another concern is my personal home I share with my wife in Burley. This home will likely be going into foreclosure and my wife wants to file Bankruptcy. I am contemplating leaving my wife. I am worried about any future assets being protected from foreclosure, bankruptcy or divorce.

EXHIBIT

Page 2 of 3 Pages

Thank you for your time, concern and expertise regarding the above issues.

Sincerely,



John H. Cornell

Please send all correspondence to:

7325 Rustic Crest Street

Las Vegas, Nevada 89149

(702) 453 7749

EXHIBIT C

Page 3 of 3 Pages



September 17, 2010 Third Attempt

August 20, 2010 Second Attempt

Second Request by Registered mail

Three Telephone Requests

No Return Call - No Response by Mail

Alison M. Brandt, Esq.

125 Johnson Avenue

Kendrick, Idaho 83537

(208) 476-7212

Ms. Alison Brandt,

This letter is being written to you to request a copy of my parent's, Michael and Arlie Cornell's Trust.

The reason I am requesting a copy is because I have not been informed of the details of the estate. My sister Toni Johnson has refused my requests for a copy of my parent's Trust. My sister refuses to discuss any details of the Trust with me. I have never received or been given the opportunity to read or review the Trust. I have absolutely no details regarding the assets of the estate. I am concerned about my personal property which is adjacent to my parent's property. How is the property I own being handled? I would appreciate notification and details of the listing if and when the properties are listed. Has the property been listed for sale?

If so why was I not given the opportunity to discuss or be involved with the details of a listing?

Why have I been told I cannot enter my parent's property? On what legal basis does Toni have to keep me from my parent's property? The property belongs to both me and my sister.

Is it fair that Toni has a place to live and I do not have a place to live? Why should I incur living expenses and she is in complete control of everything, living off the money in the trust and living free in my parent's house, which is also my house?

Why are the details of my parent's financial information being kept from my review?

It is my understanding by law the details of the Estate are to be discussed with me before action is taken in any way regarding the Estate.

EXHIBIT 10

Page 1 of 2 Pages



Since I have already waited for the information and it has not been given to me by my sister and the letters I sent to you, after checking with the USPS tracking information regarding the Registered Return Receipt, I was informed the letters had been sitting in your Post Office Box in Orofino, Idaho unclaimed for fifteen days. The second Registered Return Receipt Letter was sent to your Kendrick, Idaho address and was returned to me. Please send to me the requested information immediately.

My attorney Mr. Aherin in Lewiston, recommended that I send this "third" letter Regular Mail. I told him I would follow his instructions however, Ms. Brandt has refused two registered letters and my telephone calls. My telephone messages included a request for a return call. I never received a return call from you. You requested that all correspondence with my sister go through you and you will not answer my correspondence or calls. How do you expect this arrangement to work when you will not respond to my attempts to contact you?

I am in much better health at this time and ready to protect my position and assets regarding the estate and my rights.

Please contact me if you have any questions or concerns.

Sincerely,

John H. Cornell  
7325 Rustic Crest Street  
Las Vegas, Nevada 89149  
(702) 453-7748

**Please Note:** The address and telephone number given to you (above) is my Aunt's home. Please send all correspondence to this address. For telephone contact messages please leave your name and number with my Aunts and I will return your call. Thank you.

Please keep information confidential. My Aunt's do not want to be involved in these issues. This is between my sister and me. Thank you.

EXHIBIT D

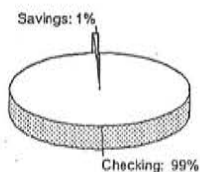
Page 2 of 2 Pages



## your PMA account

Percent of total	Balance last month (\$)	Balance this month (\$)	Increase/decrease (\$)	Percent change
18%	6,925.22	8,955.11	2,029.89	29.31%
81%	39,650.91	39,650.91	0.00	0.00%
<1%	479.30	479.35	0.05	0.01%
<b>Total assets</b>	<b>\$47,055.43</b>	<b>\$49,085.37</b>	<b>\$2,029.94</b>	<b>4.31%</b>

### Total asset allocation (by account type)



## Liabilities

Account (Account Number)	Percent of total	Outstanding balance last month (\$)	Outstanding balance this month (\$)	Increase/decrease (\$)	Percent change
Wells Fargo Credit Card † (5490-9624-9039-9265)	N/A	490.09	0.00	(490.09)	(100.00)%
<b>Total liabilities</b>		<b>\$490.09</b>	<b>\$0.00</b>	<b>(\$490.09)</b>	<b>(100.00)%</b>

† Refer to your statement for actual statement dates.

## Available credit

The information below may not be current. Be sure to verify the credit available on your accounts when accessing your credit lines.

Account	Approved credit line	Credit used	Credit available
Wells Fargo Credit Card (5490-9624-9039-9265)	16,400.00	0.00	16,400.00
<b>Total available credit</b>	<b>\$16,400.00</b>	<b>\$0.00</b>	<b>\$16,400.00</b>

## Interest, dividends and other income

The information below should not be used for tax planning purposes.

Account	This month	This year
PMA® Prime Checking Account (344380183)	0.69	2.18
Wells Fargo Money Market Savings™ (6860432969)	0.05	0.20
<b>Total interest, dividends and other income</b>	<b>\$0.74</b>	<b>\$2.38</b>

EXHIBIT

Page 1 of 2 Page 99



## Wells Fargo Custom Checking<sup>®</sup>

### Activity summary

Balance on 2/6	39,650.91
Deposits/Additions	0.00
Withdrawals/Subtractions	-0.00
<b>Balance on 3/5</b>	<b>\$39,650.91</b>

Account number: **1500023740**

THE MICHAEL S CORNELL AND ARLIE

MICHAEL S CORNELL TTE

TONI C JOHNSON TTE

Wells Fargo Bank, N.A., California (Member FDIC)

Questions about your account: **1-800-742-4932**Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.

EXHIBIT

E

Page 2 of 2 Pages

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# PMA<sup>®</sup> Wells Fargo<sup>®</sup> PMA Package

MICHAEL S CORNELL  
TONI C JOHNSON  
5319 LAKEVIEW RD  
OROFINO ID 83544-6127

If you have questions about this statement or  
your accounts:

Phone: 1-800-742-4932, TTY: 1-800-600-4833  
Spanish: 1-877-727-2932, TTY: 1-888-355-6052  
Chinese: 1-800-288-2288

Online: wells Fargo.com

Write: Wells Fargo Bank, N.A.  
P.O. Box 6995  
Portland, OR 97228-6995

## October 7, 2010

<b>Total assets:</b>	<b>\$34,970.78</b>
Last month:	\$36,262.89
Change in \$:	\$(1,292.11)
Change in %:	(3.56)%

<b>Total liabilities:</b>	<b>\$0.00</b>
Last month:	\$0.00
Change in \$:	\$0.00
Change in %:	0.00%

**PMA Qualifying Balance: \$34,970.78**

Contents	Page
Overview. . . . .	2
PMA* Prime Checking Account. . . . .	3
Other Checking. . . . .	5
Savings. . . . .	6

EXHIBIT F

Page 1 of 10 Pages



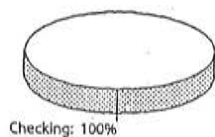


## Overview of your PMA account

### Assets

Percent of total	Balance last month (\$)	Balance this month (\$)	Increase/decrease (\$)	Percent change
7%	1,807.38	2,315.26	507.88	28.10%
93%	34,425.91	32,625.91	(1,800.00)	(5.23)%
<1%	29.60	29.61	0.01	0.03%
<b>Total assets</b>	<b>\$36,262.89</b>	<b>\$34,970.78</b>	<b>(\$1,292.11)</b>	<b>(3.56)%</b>

### Total asset allocation (by account type)



## Interest, dividends and other income

The information below should not be used for tax planning purposes.

Account	This month	This year
PMA® Prime Checking Account (344380183)	0.06	3.86
Wells Fargo Money Market Savings™ (6860432969)	0.01	0.46
<b>Total interest, dividends and other income</b>	<b>\$0.07</b>	<b>\$4.32</b>

EXHIBIT

F

Page 2 of 10 Pages



# PMA<sup>®</sup> Prime Checking Account

## Activity summary

Balance on 9/9	1,807.38
Deposits/Additions	1,800.06
Withdrawals/Subtractions	-1,292.18
<b>Balance on 10/7</b>	<b>\$2,315.26</b>

Account number: **344380183****MICHAEL S CORNELL**  
**TONI C JOHNSON**

Wells Fargo Bank, N.A., California (Member FDIC)

Questions about your account: **1-800-742-4932**Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.

## Overdraft protection

Your account is linked to the following for Overdraft Protection:

☒ Credit card

## Interest you've earned

Interest earned this month	\$0.06
Average collected balance this month	\$1,605.78
Annual percentage yield earned	0.05%
Interest paid this year	\$3.86

## Transaction history

Date	Description	Check No.	Deposits/ Additions	Withdrawals/ Subtractions	Ending Daily Balance
<b>Beginning balance on 9/9</b>					<b>1,807.38</b>
9/9	Check	10781 ✓		18.77	1,788.61
9/10	Check Crd Purchase 09/09 Vesta *MCI/Verizon 800-3171656 OR 434256Xxxxxx9288 253040007281626 ?McC=4814 01			11.50	
9/10	Check	10785 ✓		55.00	1,722.11
9/13	Check	10787 ✓		123.65	1,598.46
9/14	Check	10789 ✓		31.04	
9/14	Check	10788 ✓		17.47	1,549.95
9/16	Check	10791 ✓		40.19	1,509.76
9/20	Check	10795 ✓		90.88	
9/20	Check	10793 ✓		17.09	1,401.79
9/21	Check	10786 ✓		117.13	
9/21	Check	10796 ✓		33.66	
9/21	Check	10797 ✓		22.71	
9/21	Check	10798 ✓		21.64	1,206.65
9/23	ATM Withdrawal - 09/23 Mach ID 1079B 210 Michigan Ave Orofino ID 9288 0002865			60.00	
9/23	Check	10800 ✓		13.07	
9/23	Amerigas Propane Checkpymt 092210 10794 5491082660	^10794 ✓		9.54	1,124.04
9/24	Check	10804 ✓		12.67	
9/24	Check	10792 ✓		9.95	1,101.42
9/27	Check	10802 ✓		8.64	1,092.78
9/28	Check	10784 ✓		83.95	
9/28	Frontier 13 Arc Bill Pymt 100927 10799 0000000301251003906656	^10799 ✓		43.97	
9/28	Check	10803 ✓		35.00	
9/28	Check	10806 ✓		26.36	
9/28	Check	10810 ✓		23.36	
9/28	Check	10805 ✓		14.32	865.82
9/29	Check	10811 ✓		6.36	859.46
9/30	Check	10808 ✓		73.11	786.35
10/1	Transfer From DDA # 000001500023740		1,800.00 ✓		
10/1	Dish Network Bill Pymt 100930 10809 *****3655	^10809 ✓		68.99	
10/1	Check	10812 ✓		29.12	
10/1	Check	10813 ✓		3.90	2,484.34
10/4	Check	10819 ✓		15.16	2,469.18
10/5	Check	10807 ✓		26.00	143

EXHIBIT

Page 3 of 10 Pages



**PMA® PRIME CHECKING ACCOUNT (CONTINUED)**

Date	Description	Check No.	Deposits/ Additions	Withdrawals/ Subtractions	Ending Daily Balance
10/5	Check	10817		24.29	
10/5	Check	10816		6.00	2,412.89
10/6	Check	10818		35.58	2,377.31
10/7	Check	10820		62.11	
10/7	Interest Payment		0.06		2,315.26
<b>Ending balance on 10/7</b>					<b>2,315.26</b>
<b>Totals</b>			<b>\$1,800.06</b>	<b>\$1,292.18</b>	

Key to symbols: ^ **Converted check:** Paper check converted to an electronic format by your payee or designated representative.  
Converted checks cannot be returned, copied or imaged.

**Summary of checks written** (checks listed are also displayed in the preceding Transaction history section)

Number	Date	\$ Amount	Number	Date	\$ Amount	Number	Date	\$ Amount
10781	9/9	18.77	10796	9/21	33.66	10808	9/30	73.11
10784 *	9/28	83.95	10797	9/21	22.71	10809	10/1	68.99
10785	9/10	55.00	10798	9/21	21.64	10810	9/28	23.36
10786	9/21	117.13	10799	9/28	43.97	10811	9/29	6.36
10787	9/13	123.65	10800	9/23	13.07	10812	10/1	29.12
10788	9/14	17.47	10802 *	9/27	8.64	10813	10/1	3.90
10789	9/14	31.04	10803	9/28	35.00	10816 *	10/5	6.00
10791 *	9/16	40.19	10804	9/24	12.67	10817	10/5	24.29
10792	9/24	9.95	10805	9/28	14.32	10818	10/6	35.58
10793	9/20	17.09	10806	9/28	26.36	10819	10/4	15.16
10794	9/23	9.54	10807	10/5	26.00	10820	10/7	62.11
10795	9/20	90.88						

\*Gap in check sequence.

**Direct Deposit Advance Important Change in Terms Notice - Additional terms regarding Payment by Mail Set-up fee**  
- Effective immediately the following terms are added. All other repayment terms as communicated in the 'Important Change in Terms Notice' you received when you opened your consumer checking account or received within your consumer checking account statement remain the same.

**Payment by Mail - Refundable Set-up fee.** The set-up fee is refundable and will be automatically credited to your consumer checking account if your first two (2) payments under the Payment by Mail method are made for the full amount outstanding on or before the Payment Due Date as indicated on your periodic billing statement. You do not need to use the service immediately or for consecutive statement periods to qualify for the refund. In order to be eligible for the refund a late fee cannot have been assessed prior to making your first two (2) payments. The refund will appear on your checking account statement following the 2nd full payment.

For complete details about this service, please refer to the Direct Deposit Advance Service Agreement and Product Guide and any addendum or amendment or speak with a banker at the phone number listed above.

EXHIBIT

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# Wells Fargo Custom Checking®

## Activity summary

Balance on 9/9	34,425.91
Deposits/Additions	0.00
Withdrawals/Subtractions	- 1,800.00
<b>Balance on 10/7</b>	<b>\$32,625.91</b>

Account number: **1500023740****THE MICHAEL S CORNELL AND ARLIE  
MICHAEL S CORNELL TTE  
TONI C JOHNSON TTE**

Wells Fargo Bank, N.A., California (Member FDIC)

Questions about your account: **1-800-742-4932**Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.

## Transaction history

Date	Description	Check No.	Deposits/ Additions	Withdrawals/ Subtractions	Ending Daily Balance
Beginning balance on 9/9					<b>34,425.91</b>
10/1	Transfer to DDA # [REDACTED]			1,800.00	32,625.91
Ending balance on 10/7					<b>32,625.91</b>
Totals			<b>\$0.00</b>	<b>\$1,800.00</b>	

### Get your credit report and help protect your identity

There's a new way to help manage your credit and protect your identity: Enhanced Identity Theft Protection.

When you enroll, you'll gain insight into how your everyday financial decisions impact your credit and credit score. Then, you can make decisions to help reach your financial goals - whether it's paying off debt, saving more or increasing your credit score. Enhanced Identity Theft Protection delivers monthly, triple credit bureau reports and scores, online calculators, a credit score tracker, credit score alerts and more.

Start protecting your credit and identity today by enrolling for just \$1 for the first month and only \$15.99 monthly thereafter. Visit [wellsfargo.com/enhanced](http://wellsfargo.com/enhanced) to enroll today.

EXHIBIT

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# Wells Fargo Money Market Savings<sup>SM</sup>

## Activity summary

Balance on 9/9	29.60
Deposits/Additions	0.01
Withdrawals/Subtractions	- 0.00
<b>Balance on 10/7</b>	<b>\$29.61</b>

Account number: [REDACTED]

**MICHAEL S CORNELL**  
**TONI C JOHNSON**

Wells Fargo Bank, N.A., Idaho (Member FDIC)

Questions about your account: **1-800-742-4932**Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.

## Interest you've earned

Interest earned this month	\$0.01
Average collected balance this month	\$29.60
Annual percentage yield earned	0.43%
Interest paid this year	\$0.46

## Transaction history

Date	Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending Daily Balance
<b>Beginning balance on 9/9</b>				<b>29.60</b>
10/7	Interest Payment	0.01		29.61
<b>Ending balance on 10/7</b>				<b>29.61</b>
<b>Totals</b>		<b>\$0.01</b>	<b>\$0.00</b>	

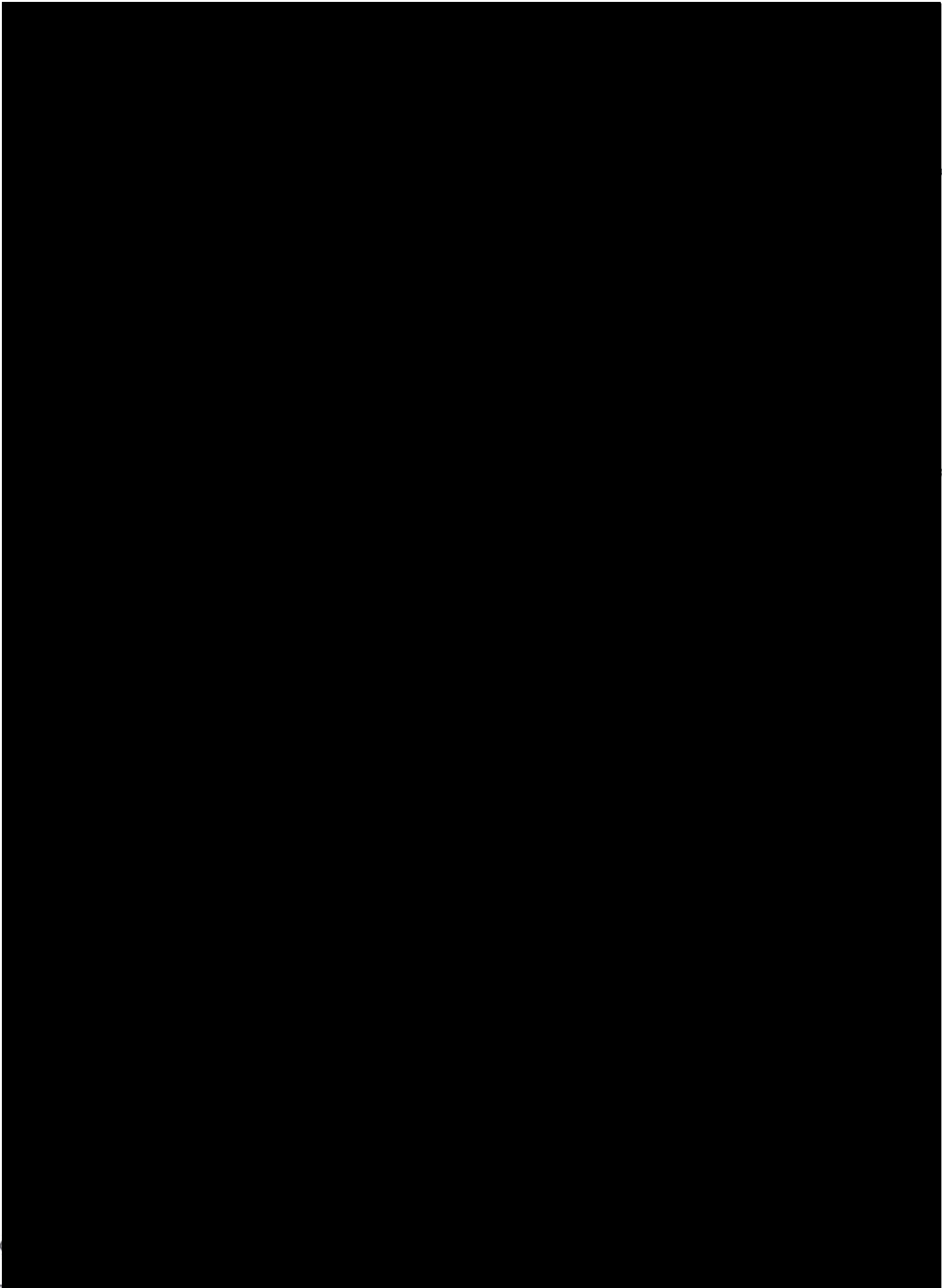
EXHIBIT

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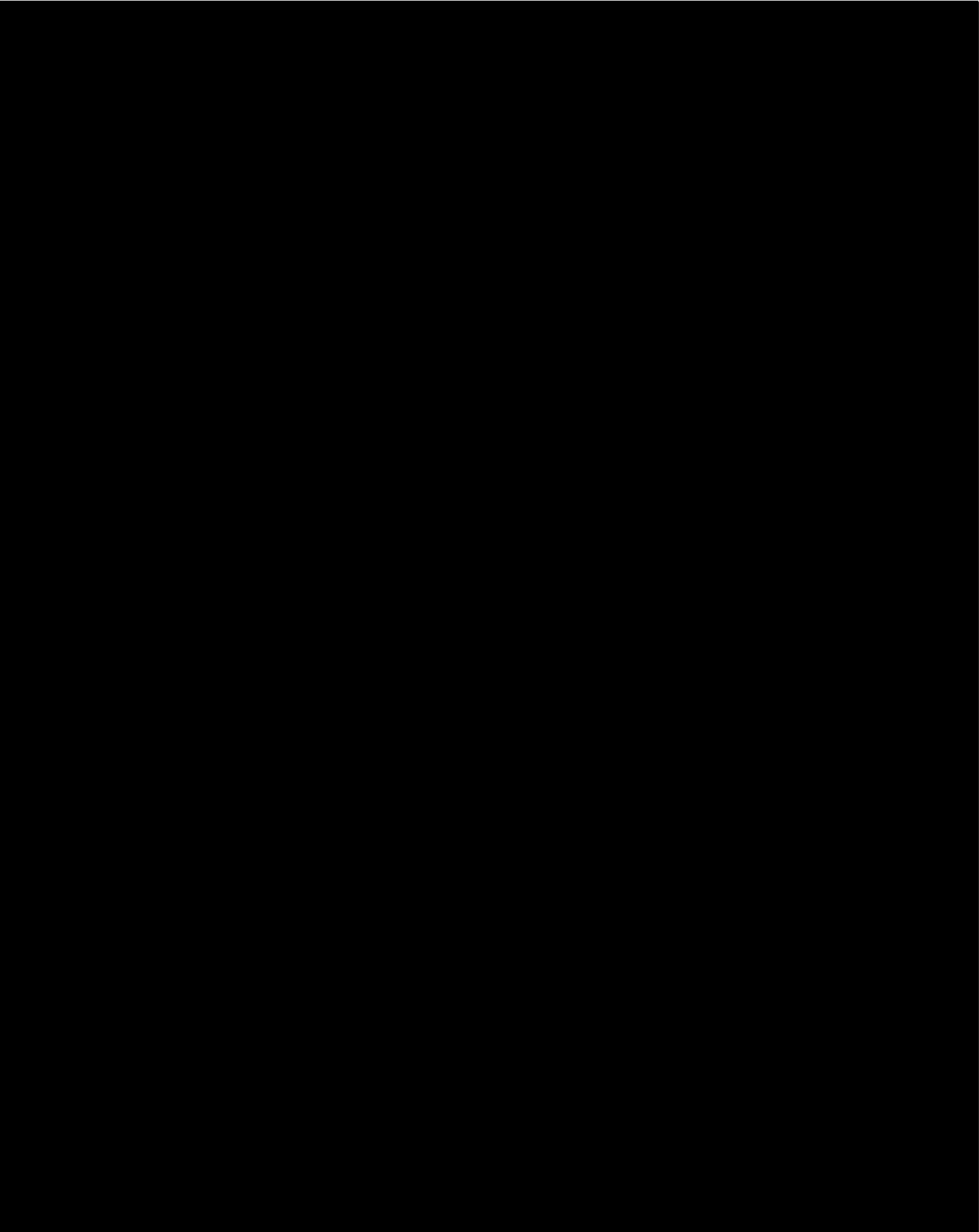
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# Complete Advanta Checking

Account number [REDACTED] September 9, 2011 - October 7, 2011 Page 1 of 5



MICHAEL S CORNELL  
TONI C JOHNSON  
5319 LAKEVIEW RD  
OROFINO ID 83544-6127

## Questions?

Available by phone 24 hours a day, 7 days a week:

**1-800-TO-WELLS** (1-800-869-3557)

TTY: 1-800-877-4833

En español: 1-877-727-2932 TTY: 1-888-355-6052

華語 1-800-288-2288 (6 am to 7 pm PT, M-F)

Online: wells Fargo.com

Write: Wells Fargo Bank, N.A. (114)  
P.O. Box 6995  
Portland, OR 97228-6995

## You and Wells Fargo

- Wells Fargo Bank is consistently rated as "Outstanding" for the Community Reinvestment Act (CRA) by federal regulators, the highest rating a financial services institution can receive.

## Account options

A check mark in the box indicates you have these convenient services with your account. Go to wells Fargo.com or call the number above if you have questions or if you would like to add new services.

Online Banking	<input checked="" type="checkbox"/>	Direct Deposit	<input type="checkbox"/>
Online Bill Pay	<input type="checkbox"/>	Rewards Program	<input type="checkbox"/>
Online Statements	<input type="checkbox"/>	Auto Transfer/Payment	<input type="checkbox"/>
Mobile Banking	<input type="checkbox"/>	Overdraft Protection	<input checked="" type="checkbox"/>
My Spending Report	<input checked="" type="checkbox"/>	Debit Card	<input type="checkbox"/>
		Overdraft Service	<input type="checkbox"/>



## IMPORTANT ACCOUNT INFORMATION

Revised Agreement for Online Banking  
We've updated our Online Access Agreement.  
To see what has changed, please visit wells Fargo.com/onlineupdates.

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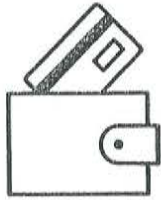
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Pages



## With you when you're shopping for the perfect gift

Give yourself extra spending security this season. Our Zero Liability protection keeps your personal or business Wells Fargo Debit Cards and Credit Cards safe from promptly reported unauthorized transactions at no extra cost. Speak with a banker, call us at 1-800-WFB-OPEN or visit wells Fargo.com to learn more today.

### Activity summary

Beginning balance on 9/9	\$1,622.46
Deposits/Additions	1,871.04
Withdrawals/Subtractions	- 1,970.87
<b>Ending balance on 10/7</b>	<b>\$1,522.63</b>

Account number

**MICHAEL S CO  
TONI C JOHNSON**

*California account terms and conditions apply*

For Direct Deposit and Automatic Payments use  
Routing Number (RTN): 121042882

### Overdraft Protection

Your account is linked to the following for Overdraft Protection:

■ Credit Card

### Interest summary

Interest paid this statement	\$0.04
Average collected balance	\$1,160.54
Annual percentage yield earned	0.04%
Interest earned this statement period	\$0.04
Interest paid this year	\$0.58

### Transaction history

Date	Check Number	Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending daily balance
9/9	11161	Check		124.59	
9/9	11158	Check		40.28	
9/9	11157	Check		25.00	1,432.59
9/12	11151	Check		121.00	
9/12	^11152	Kinecta Fcu Check Pymt 11152		100.00	
9/12	11135	Check		54.87	
9/12	11162	Check		2.85	1,153.87
9/13	11155	Check		141.15	
9/13	11160	Check		16.50	996.22
9/15	11165	Check		49.02	
9/15	11163	Check		2.85	944.35
9/19	11164	Check		38.48	905.87
9/20	11154	Check		113.71	792.16
9/21	11168	Check		85.00	707.16
9/22	^11167	Target Bank Checkpaymt 110922 11167 00001496318		125.63	
9/22	11120	Check		53.27	
9/22	11126	Check		52.22	
9/22	11171	Check		49.70	
9/22	11169	Check		9.35	416.99
9/23	11170	Check		18.98	398.01

EXHIBIT



WELLS  
FARGO

Transaction history (continued)

Date	Check Number	Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending daily balance
9/26		Tele-Transfer Fr Savings xxxxxx8663 Reference # Tfe58H9Yjn	100.00		498.01
9/27	^11172	Frontier 13 Arc Bill Pymt 110926 11172 0000000301251003906656		42.76	
9/27	^11166	Amerigas Propane Checkpymt 092611 11166 5491082660		10.60	444.65
9/28		Tele-Transfer Fr Savings xxxxxx8663 Reference # Tfetjv5Jtm	1,500.00		
9/28		Check Crd Purchase 09/27 Orofino Builders Suppl Orofino ID 434256xxxxxx9288 271140012375516 ?McC=5211 90		3.48	1,941.17
9/29	11174	Check		50.61	1,890.56
9/30	11175	Check		39.75	
9/30	11176	Check		16.84	
9/30	11173	Check		5.00	1,828.97
10/4	11177	Check		121.00	
10/4	11178	Check		76.15	1,631.82
10/5		Tele-Transfer Fr Savings xxxxxx8663 Reference # Tfejtrj92R	271.00		
10/5	11185	Check		118.91	
10/5	11186	Check		75.00	
10/5	^11179	Dish Network Bill Pymt 111004 11179 *****3655		73.99	1,634.92
10/6	11180	Check		46.25	
10/6	11190	Check		38.65	
10/6	11187	Check		11.65	1,538.37
10/7	11191	Check		15.78	
10/7		Interest Payment	0.04		1,522.63
Ending balance on 10/7					1,522.63
Totals			\$1,871.04	\$1,970.87	

The Ending Daily Balance does not reflect any pending withdrawals or holds on deposited funds that may have been outstanding on your account when your transactions posted. If you had insufficient available funds when a transaction posted, fees may have been assessed.

^ **Converted check:** Check converted to an electronic format by your payee or designated representative. Checks converted to electronic format cannot be returned, copied or imaged.

Summary of checks written (checks listed are also displayed in the preceding Transaction history)

Number	Date	Amount	Number	Date	Amount	Number	Date	Amount
11120	9/22	53.27	11163	9/15	2.85	11175	9/30	39.75
11126 *	9/22	52.22	11164	9/19	38.48	11176	9/30	16.84
11135 *	9/12	54.87	11165	9/15	49.02	11177	10/4	121.00
11151 *	9/12	121.00	11166	9/27	10.60	11178	10/4	76.15
11152	9/12	100.00	11167	9/22	125.63	11179	10/5	73.99
11154 *	9/20	113.71	11168	9/21	85.00	11180	10/6	46.25
11155	9/13	141.15	11169	9/22	9.35	11185 *	10/5	118.91
11157 *	9/9	25.00	11170	9/23	18.98	11186	10/5	75.00
11158	9/9	40.28	11171	9/22	49.70	11187	10/6	11.65
11160 *	9/13	16.50	11172	9/27	42.76	11190 *	10/6	38.65
11161	9/9	124.59	11173	9/30	5.00	11191	10/7	15.78
11162	9/12	2.85	11174	9/29	50.61			

\* Gap in check sequence.

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## IMPORTANT ACCOUNT INFORMATION

Enjoy safe and secure savings with a Wells Fargo Time Account (CD). You will get a guaranteed rate of return and have the peace of mind of knowing your money is FDIC insured up to applicable limits. Talk with your Wells Fargo Banker today.

Turn off the paper clutter . . . If you bank online, get your statement online. It's easy to switch to Online Only Statements. Sign on at [wellsfargo.com/turnoffpaper](http://wellsfargo.com/turnoffpaper), select Online Only, or check the box Switch All to Online Only Delivery and click Submit at the bottom of the page. Online statements reduce paper clutter, help protect against identity theft, and they're gentle on the environment.











# Complete Advantage Checking

7, 2011 - June 7, 2011 ■ Page 1 of 4

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MICHAEL S CORNELL  
TONI C JOHNSON  
5319 LAKEVIEW RD  
OROFINO ID 83544-6127

## Questions?

Available by phone 24 hours a day, 7 days a week:

**1-800-TO-WELLS** (1-800-869-3557)

TTY: 1-800-877-4833

En español: 1-877-727-2932 TTY: 1-888-355-6052

華語 1-800-288-2288 (8 am to 7 pm PT, M-F)

Online: wells Fargo.com

Write: Wells Fargo Bank, N.A. (114)  
P.O. Box 6995  
Portland, OR 97228-6995

## You and Wells Fargo

Thank you for being a Wells Fargo customer. We appreciate your business and understand that you are entrusting us with your banking needs. Let us assist you in finding the right accounts and services to help you reach your financial goals. Please visit us online at wells Fargo.com, call us at the number at the top of your statement, or visit any Wells Fargo store - we'd love to hear from you!

## Account options

A check mark in the box indicates you have these convenient services with your account. Go to wells Fargo.com or call the number above if you have questions or if you would like to add new services.

Online Banking	<input checked="" type="checkbox"/>	Direct Deposit	<input type="checkbox"/>
Online Bill Pay	<input type="checkbox"/>	Overdraft Protection	<input checked="" type="checkbox"/>
Online Statements	<input type="checkbox"/>	Rewards Program	<input type="checkbox"/>
Mobile Banking	<input type="checkbox"/>	Auto Transfer/Payment	<input type="checkbox"/>
My Spending Report	<input checked="" type="checkbox"/>		



## IMPORTANT ACCOUNT INFORMATION

### Shared ATM Deposits

Effective July 28, 2011, we will no longer accept deposits made at non-Wells Fargo STAR and Instant Cash Shared Network ATMs. To make an ATM deposit, please visit one of our 12,000 Wells Fargo or Wachovia a Wells Fargo company, ATMs.



## With you when you're protecting the things you value most

Protecting the things that matter most in your life is easier with Wells Fargo Insurance. We can help you find the type of coverage that fits your needs. And, with competitive quotes from the multiple companies we represent, you'll get a price that's right for you. Meet with us or visit wells Fargo.com/insurance to learn more today.

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### Activity summary

Beginning balance on 5/7	\$1,739.27
Deposits/Additions	1,500.06
Withdrawals/Subtractions	- 1,779.28
Ending balance on 6/7	\$1,460.05

Account numbers

MICHAEL S COR  
TONI C JOHNSON

California account terms and conditions apply

For Direct Deposit and Automatic Payments use  
Routing Number (RTN): 121042882

### Overdraft Protection

Your account is linked to the following for Overdraft Protection:

☒ Credit Card

### Interest summary

Interest paid this statement	\$0.06
Average collected balance	\$1,355.78
Annual percentage yield earned	0.05%
Interest earned this statement period	\$0.06
Interest paid this year	\$0.37

### Transaction history

Date	Check Number	Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending daily balance
5/10	11040	Check		53.20	
5/10	11037	Check		17.86	
5/10	11036	Check		9.60	
5/10	11035	Check		9.35	1,649.26
5/11		Check Crd Purchase 05/10 Northwest Drug & Gift Orofino ID 434256xxxxxx9288 131140012404209 ?McC=5912 90		7.06	
5/11	11041	Check		17.18	1,625.02
5/13	11043	Check		30.02	
5/13	11044	Check		21.27	1,573.73
5/16	11045	Check		121.00	1,452.73
5/18	11046	Target Bank Checkpaymt 110518 11046 00001496318		119.81	
5/18	11047	Check		75.00	1,257.92
5/19	11038	Check		149.47	
5/19	11049	Check		46.62	1,061.83
5/23		Check Crd Purchase 05/20 Hayes Foods & Hardw Orofino ID 434256xxxxxx9288 142140012909126 ?McC=5411 90		8.47	
5/23	11051	Check		8.80	1,044.56
5/24	11050	Check		40.00	
5/24	11052	Check		21.33	983.23
5/25	11048	Check		53.80	
5/25	11042	Check		53.80	
5/25	11033	Check		49.57	826.06
5/26	11016	Check		52.22	
5/26	11007	Check		49.57	724.27
5/27	11029	Check		52.22	
5/27	11023	Check		39.83	
5/27	11056	Check		38.24	593.98
5/31		Tele-Transfer Fr Savings xxxxxx8663 Reference # T1etj36V7	1,500.00		
5/31	11039	Check		80.03	
5/31	11053	Frontier 13 Arc Bill Pymt 110527 11053 0000000301251003906656		42.53	1,971.42
6/2	11054	Dish Network Bill Pymt 110601 11054 *****3655		73.99	
6/2	11058	Check		7.90	1,889.53
6/3	11057	Check		75.00	

EXHIBIT



WELLS  
FARGO

## Transaction history (continued)

Date	Check Number Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending daily balance
6/3	11060 Check		50.24	
6/3	11061 Check		23.58	1,740.71
6/6	11062 Check		73.11	1,667.60
6/7	11065 Check		107.61	
6/7	^11063 Kinecta Fcu Check Pymt 11063		100.00	
6/7	Interest Payment	0.06		
Ending balance on 6/7				1,460.05
Totals				1,460.05
		\$1,500.06	\$1,779.28	

The Ending Daily Balance does not reflect any pending withdrawals or holds on deposited funds that may have been outstanding on your account when your transactions posted. If you had insufficient available funds when a transaction posted, fees may have been assessed.

^ **Converted check:** Check converted to an electronic format by your payee or designated representative. Checks converted to electronic format cannot be returned, copied or imaged.

## Summary of checks written (checks listed are also displayed in the preceding Transaction history)

Number	Date	Amount	Number	Date	Amount	Number	Date	Amount
11007	5/26	49.57	11041	5/11	17.18	11052	5/24	21.33
11016 *	5/26	52.22	11042	5/25	53.80	11053	5/31	42.53
11023 *	5/27	39.83	11043	5/13	30.02	11054	6/2	73.99
11029 *	5/27	52.22	11044	5/13	21.27	11056 *	5/27	38.24
11033 *	5/25	49.57	11045	5/16	121.00	11057	6/3	75.00
11035 *	5/10	9.35	11046	5/18	119.81	11058	6/2	7.90
11036	5/10	9.60	11047	5/18	75.00	11060 *	6/3	50.24
11037	5/10	17.86	11048	5/25	53.80	11061	6/3	23.58
11038	5/19	149.47	11049	5/19	46.62	11062	6/6	73.11
11039	5/31	80.03	11050	5/24	40.00	11063	6/7	100.00
11040	5/10	53.20	11051	5/23	8.80	11065 *	6/7	107.61

\* Gap in check sequence.



## IMPORTANT ACCOUNT INFORMATION

## Save time with Online Bill Pay

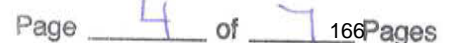
Save time, avoid late fees, and save on postage costs. Be at ease knowing your payments get there fast-with over 90% of our top payees able to receive payments in 2 days or less. You can even make same day payments to Wells Fargo credit accounts, and to other select merchants. Pay your bills efficiently with Wells Fargo Bill Pay-backed by our Payment Guarantee. We guarantee your payments will be paid as scheduled, on time, every time. Go to [wellsfargo.com](http://wellsfargo.com) or [wellsfargo.com/biz](http://wellsfargo.com/biz) to sign up or sign on today.

EXHIBIT

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## Check Images

MICHAEL S. CORNELL  
ARLIE M. CORNELL  
TONI C. JOHNSON  
8335 LAKEVIEW RD. PH 208-476-3284  
OROFINO, IDAHO 83644

10/5/10

10820  
15-24/1220 5408  
10943307183

Pay to the  
Order of Les Schwab \$ 62.11  
Sixty two & 11/100 Dollars

Wells Fargo Bank, N.A.  
Customer  
Since 1970

For Toni C. Johnson

⑆122000247⑆ 0344380183⑆ 10820 ⑆0000006211⑆

REF#8416119903 CK# 10820 62.11

EXHIBIT F

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**PMA**® Wells Fargo® PMA Package

MICHAEL S CORNELL  
TONI C JOHNSON  
5319 LAKEVIEW RD  
OROFINO ID 83544-6127

If you have questions about this statement or  
your accounts:

Phone: 1-800-742-4932, TTY: 1-800-600-4833  
Spanish: 1-877-727-2932, TTY: 1-888-355-6052  
Chinese: 1-800-288-2288

Online: wells Fargo.com

Write: Wells Fargo Bank, N.A.  
P.O. Box 6995  
Portland, OR 97228-6995

**November 5, 2010**

<b>Total assets:</b>	<b>\$32,793.72</b>
Last month:	\$34,970.78
Change in \$:	\$(2,177.06)
Change in %:	(6.23)%

<b>Total liabilities:</b>	<b>\$0.00</b>
Last month:	\$0.00
Change in \$:	\$0.00
Change in %:	0.00%

**PMA Qualifying Balance:** **\$32,793.72**

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Other Checking. . . . .	6
Savings. . . . .	7

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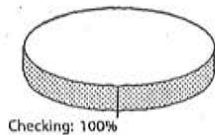


## Overview of your PMA account

### Assets

	Percent of total	Balance last month (\$)	Balance this month (\$)	Increase/decrease (\$)	Percent change
	6%	2,315.26	1,938.20	(377.06)	(16.29)%
	94%	32,625.91	30,825.91	(1,800.00)	(5.52)%
	<1%	29.61	29.61	0.00	0.00%
<b>Total assets</b>		<b>\$34,970.78</b>	<b>\$32,793.72</b>	<b>(\$2,177.06)</b>	<b>(6.23)%</b>

### Total asset allocation (by account type)



### Interest, dividends and other income

The information below should not be used for tax planning purposes.

Account	This month	This year
PMA® Prime Checking Account	0.07	3.93
Wells Fargo Money Market Sav	0.00	0.46
<b>Total interest, dividends and other income</b>	<b>\$0.07</b>	<b>\$4.39</b>

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## OVERVIEW OF YOUR PMA ACCOUNT (CONTINUED)

### Upcoming changes to your Wells Fargo PMA Package and Brokerage Account Benefits

On January 1, 2011, Wells Fargo Investments, LLC brokerage accounts will be transferred to our affiliated broker-dealer, Wells Fargo Advisors, LLC. The following is a summary of changes to the PMA Package Brokerage Account Benefits described in the Wells Fargo Consumer Account Fee and Information Schedule:  
All references to Wells Fargo Investments, LLC are replaced with Wells Fargo Advisors, LLC. Financial Consultants are now called Financial Advisors. WellsTrade and Full Service Brokerage Account Maintenance Fees and IRA Custodial Fees are now described as Annual Account Fees. Annual Account Fees also includes any other annual fees described in your Wells Fargo Advisors Brokerage Account fee schedule.

#### WellsTrade Brokerage Accounts

WellsTrade accounts linked to a PMA Package: 100 commission-free online trades per year (\$8.95 per trade thereafter, starting on January 18, 2011). Annual Account Fees will be waived for WellsTrade accounts linked to a PMA Package as of June 30 of each year.

#### Full Service Brokerage Accounts

For qualifying brokerage accounts linked to a PMA Package on or after January 1, 2011, Annual Account Fees will be waived with a PMA qualifying balance of \$250,000 or more as of June 30 of each year. (Certain brokerage accounts are not eligible for this fee waiver.)

For brokerage accounts linked to a PMA Package prior to January 1, 2011, Annual Account Fees are waived for non-IRA brokerage accounts that remain linked to a PMA Package as of June 30 of each year, with no qualifying PMA balance (\$100,000 or more qualifying PMA balance required for Brokerage IRAs, excluding Education Savings Accounts).

Certain brokerage accounts are not eligible to be linked to a PMA Package and their balances will not count toward the qualifying PMA relationship and they will not receive PMA benefits. Please contact your Financial Advisor or Investment Professional to see if your brokerage account can be linked to your Wells Fargo PMA Package.

#### INVESTMENT PRODUCTS:

- ARE NOT INSURED BY THE FDIC OR ANY OTHER FEDERAL GOVERNMENT AGENCY
- ARE NOT DEPOSITS OF OR GUARANTEED BY THE BANK OR ANY BANK AFFILIATE
- MAY LOSE VALUE

Investment products and services, including WellsTrade accounts are offered through Wells Fargo Investments, LLC (member SIPC), a registered broker dealer and non-bank affiliate of Wells Fargo & Company.

Please see an important message on the last page of your statement that describes how Wells Fargo posts transactions to your account.

EXHIBIT

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Page 3 of 12 Pages





# PMA<sup>®</sup> Prime Checking Account

## Activity summary

Balance on 10/8	2,315.26
Deposits/Additions	1,800.07
Withdrawals/Subtractions	-2,177.13
<b>Balance on 11/5</b>	<b>\$1,938.20</b>

Account number: **344380183****MICHAEL S CORNELL**  
**TONI C JOHNSON**

Wells Fargo Bank, N.A., California (Member FDIC)

Questions about your account: **1-800-742-4932**Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.

## Overdraft protection

Your account is ☐ Overdraft Protection:☐ Credit card

## Interest you've earned

Interest earned this month	\$0.07
Average collected balance this month	\$1,671.99
Annual percentage yield earned	0.05%
Interest paid this year	\$3.93

## Transaction history

Date	Description	Check No.	Deposits/ Additions	Withdrawals/ Subtractions	Ending Daily Balance
<b>Beginning balance on 10/8</b>					
10/8	Check	10815		✓ 120.00	2,315.26
10/12	ATM Withdrawal - 10/12 Mach ID 1079B 210 Michigan Ave Orofino ID 9288 0003969			✓ 40.00	2,195.26
10/12	Check Crd Purchase 10/09 Frontier Foods Orofino ID 434256Xxxxxx9288 284040005965771 ?McC=5411 90			✓ 21.91	
10/12	Check	10825 ✓		128.24	2,005.11
10/13	Check	10826 ✓		40.88	
10/13	Check	10827 ✓		26.51	
10/13	Check	10829 ✓		6.34	1,931.38
10/14	Check	10830 ✓		11.16	1,920.22
10/18	Amerigas Propane Checkpymt 101510 10828 5491082660	10828 ✓		328.13	
10/18	Check	10833 ✓		8.80	1,583.29
10/19	Check	10832 ✓		45.00	
10/19	Check	10782 ✓		42.47	
10/19	Check	10801 ✓		41.41	
10/19	Check	10790 ✓		41.41	
10/19	Check	10834 ✓		30.08	
10/20	Check	10835 ✓		29.15	1,353.77
10/20	Check	10822 ✓		109.40	
10/20	Check	10837 ✓		108.06	
10/20	Check	10831 ✓		41.94	
10/20	Check	10821 ✓		41.41	
10/20	Check	10814 ✓		37.18	1,015.78
10/25	Check	10824 ✓		135.00	
10/25	Check	10823 ✓		80.78	800.00
10/26	ATM Withdrawal - 10/26 Mach ID 1079B 210 Michigan Ave Orofino ID 9288 0004816			60.00	
10/26	Frontier 13 Arc Bill Pymt 101025 10836 0000000301251003906656	10836 ✓		46.26	
10/26	Check	10840 ✓		39.62	
10/26	Check	10841 ✓		23.61	630.51
10/27	Check	10838 ✓		75.00	555.51
10/29	Transfer From DDA		1,800.00		2,355.51
11/2	Check	10844 ✓		120.00	
11/2	Check	10848 ✓		89.75	
11/2	Check	10849 ✓		28.25	2,117.51 <sup>171</sup>

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## PMA® PRIME CHECKING ACCOUNT (CONTINUED)

Date	Description	Check No.	Deposits/ Additions	Withdrawals/ Subtractions	Ending Daily Balance
11/3	Dish Network Bill Pymt 101102 10	^10845		68.99	
11/3	Check	10847		5.45	2,043.07
11/4	Check	10852		23.83	
11/4	Check	10842		8.00	2,011.24
11/5	Check	10850		73.11	
11/5	Interest Payment		0.07		1,938.20
Ending balance on 11/5					1,938.20
Totals			\$1,800.07	\$2,177.13	

Key to symbols: ^ Converted check: Paper check converted to an electronic format by your payee or designated representative.  
Converted checks cannot be returned, copied or imaged.

## Summary of checks written (checks listed are also displayed in the preceding Transaction history section)

Number	Date	\$ Amount	Number	Date	\$ Amount	Number	Date	\$ Amount
10782	10/19	42.47	10827	10/13	26.51	10838	10/27	75.00
10790 *	10/19	41.41	10828	10/18	328.13	10840 *	10/26	39.62
10801 *	10/19	41.41	10829	10/13	6.34	10841	10/26	23.61
10814 *	10/20	37.18	10830	10/14	11.16	10842 *	11/4	8.00
10815	10/8	120.00	10831	10/20	41.94	10844 *	11/2	120.00
10821 *	10/20	41.41	10832	10/19	45.00	10845	11/3	68.99
10822	10/20	109.40	10833	10/18	8.80	10847 *	11/3	5.45
10823	10/25	80.78	10834	10/19	30.08	10848	11/2	89.75
10824	10/25	135.00	10835	10/19	29.15	10849	11/2	28.25
10825	10/12	128.24	10836	10/26	46.26	10850	11/5	73.11
10826	10/13	40.88	10837	10/20	108.06	10852 *	11/4	23.83

\* Gap in check sequence.

## Track seasonal spending online

Get your seasonal spending, bills, budget, and savings under control with My Spending Report with Budget Watch, and other free online tools from Wells Fargo Online.

Save time, spend wisely and save more by using Account Alerts, My Spending Report with Budget Watch and My Savings Plan, and Mobile and Text Banking\*. You can also download an App for your mobile device at wf.com (optimized for your mobile device).

Sign up or sign on today! Visit wells Fargo.com, wells Fargo.com/biz, or wf.com for more details.

\*Your mobile carrier's text messaging and Web access charges may apply.

EXHIBIT

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## Wells Fargo Custom Checking®

### Activity summary

Balance on 10/8	32,625.91
Deposits/Additions	0.00
Withdrawals/Subtractions	- 1,800.00
<b>Balance on 11/5</b>	<b>\$30,825.91</b>

Account number [REDACTED]

THE MICHAEL S CORNELL AND ARLIE

MICHAEL S CORNELL TTE

TONI C JOHNSON TTE

Wells Fargo Bank, N.A., California (Member FDIC)

Questions about your account: 1-800-742-4932

Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.

### Transaction history

Date	Description	Check No.	Deposits/ Additions	Withdrawals/ Subtractions	Ending Daily Balance
Beginning balance on 10/8					32,625.91
10/29	Transfer to DDA [REDACTED]			1,800.00	30,825.91
Ending balance on 11/5					30,825.91
Totals			\$0.00	\$1,800.00	

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## Wells Fargo Money Market Savings<sup>SM</sup>

### Activity summary

Balance on 10/8	29.61
Deposits/Additions	0.00
Withdrawals/Subtractions	- 0.00
<b>Balance on 11/5</b>	<b>\$29.61</b>

Account number [REDACTED]

**MICHAEL S CORNELL**  
**TONI C JOHNSON**

*Wells Fargo Bank, N.A., Idaho (Member FDIC)*

Questions about your account: **1-800-742-4932**

Worksheet to balance your account and General  
Statement Policies can be found towards the  
end of this statement.

### Interest you've earned

Interest paid on 11/5	\$0.00
Average collected balance this month	\$29.61
Annual percentage yield earned	0.00%
Interest paid this year	\$0.46

EXHIBIT 6

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This message will clarify the way Wells Fargo posts transactions to your account and assesses Overdraft and Returned Item fees as of November 29, 2010.

Wells Fargo posts transactions during our nightly processing each business day. Generally, we first post deposits or incoming transfers received before the deposit cut-off time that day. We then post your withdrawals (such as ATM, debit card or check transactions) that have been received for payment from your account. We pay some categories (or types) of transactions, such as debit card transactions, before other types of transactions, such as checks. If there are multiple transactions within a category, the order in which the transactions are posted will vary depending on the type of transaction.

For example, effective November 29, 2010, we will pay the most common types of transactions in the following order:

- ATM and debit card transactions - transactions will be sorted by the date the transaction was conducted. If a merchant does not seek pre-authorization from the bank at the time of the transaction, we will use the date the transaction is received for payment from your account. If there are multiple transactions on a date, those transactions will be sorted by time (where that information is available to our posting systems); the remaining transactions on that date will be sorted and paid from lowest to highest dollar amount.
- Account transfers, teller cashed checks and teller cash withdrawals - If there are multiple transactions, the transactions will be sorted and paid from highest to lowest dollar amount.
- Checks, Bill Pay and automatic payments (also known as ACH) - If there are multiple transactions, the transactions will be sorted and paid from highest to lowest dollar amount.

If you do not have sufficient available funds to cover a transaction, we will take one or more of the following actions: transfer available funds from any linked Overdraft Protection account(s); pay the transaction, creating an overdraft in your account; or return the transaction unpaid due to insufficient funds. Applicable Overdraft and Returned Item fees will post to your account the morning following our nightly processing.

In determining whether you have sufficient funds to cover a transaction, we will consider all transactions that have posted to your account, any holds that may be in place on deposits you have made, and pending transactions (such as pending debit card purchases or ATM withdrawals) that the bank has authorized but that have not yet posted to your account. Overdraft and/or Returned Item fees will ordinarily be assessed on posted transactions that exceed your available balance. (Overdraft fees will not apply to ATM and one-time debit card transactions that post against insufficient funds, unless you have enrolled in our Debit Card Overdraft Service.)

If we receive multiple transactions within a category for payment and if we determine there are sufficient funds to pay one or more but not all of the transactions, then the number of transactions paid and the Overdraft and Returned Item fees assessed could be affected by the order that we choose to post those transactions. For all categories of transactions (other than ATM and one-time debit card transactions), we post transactions in the order of highest to lowest dollar amount, which could result in more Overdraft and Returned Item fees than if we were to post the transactions in a different order.









# Complete Advantage<sup>SM</sup> Checking

Account number: [REDACTED] January 8, 2011 - February 7, 2011 Page 1 of 4

WELLS  
FARGO

1-8-11 + 02-7-11

✓

MICHAEL S CORNELL  
TONI C JOHNSON  
5319 LAKEVIEW RD  
OROFINO ID 83544-6127

## Questions?

Available by phone 24 hours a day, 7 days a week:

**1-800-TO-WELLS** (1-800-869-3557)

TTY: 1-800-877-4833

En español: 1-877-727-2932 TTY: 1-888-355-6052

華語 1-800-288-2288 (8 am to 7 pm PT, M-F)

Online: wells Fargo.com

Write: Wells Fargo Bank, N.A. (114)  
P.O. Box 6995  
Portland, OR 97228-6995

## You and Wells Fargo

At Wells Fargo, we are committed to doing what's right for our customers based on their changing needs. That's why we periodically meet with our customers to ensure they have the right accounts and services for their financial needs. Visit a banker today and request a financial review.

## Account options

A check mark in the box indicates you have these convenient services with your account. Go to wells Fargo.com or call the number above if you have questions or if you would like to add new services.

Online Banking	<input checked="" type="checkbox"/>	Direct Deposit	<input type="checkbox"/>
Online Bill Pay	<input type="checkbox"/>	Overdraft Protection	<input checked="" type="checkbox"/>
Online Statements	<input type="checkbox"/>	Rewards Program	<input type="checkbox"/>
Mobile Banking	<input type="checkbox"/>	Auto Transfer/Payment	<input type="checkbox"/>
My Spending Report	<input checked="" type="checkbox"/>		



## With you when you want help balancing spending with saving

With a Wells Fargo Cash Back<sup>SM</sup> Credit Card, you can automatically apply your cash back earnings toward an eligible Wells Fargo checking, savings, personal loan, or home equity account. To learn more, call 1-800-WFB-OPEN, talk with us, or visit wells Fargo.com today.

## Activity summary

Beginning balance on 1/8	\$2,149.02
Deposits/Additions	1,595.07
Withdrawals/Subtractions	- 1,634.73
<b>Ending balance on 2/7</b>	<b>\$2,109.36</b>

Account number: [REDACTED]

MICHAEL S CORNELL  
TONI C JOHNSON

California account terms and conditions apply

For Direct Deposit and Automatic Payments use  
Routing Number (RTN): 121042882

EXHIBIT

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img = 22

(114)  
Sheet Seq = 0015510  
Sheet 00001 of 00004



180

GA10A0A1|004106101|04101010



**Overdraft Protection**

Your account is [REDACTED] Overdraft Protection:

☒ Credit Card [REDACTED]

**Interest summary**

Interest paid this statement	\$0.07
Average collected balance	\$1,527.82
Annual percentage yield earned	0.05%
Interest earned this statement period	\$0.07
Interest paid this year	\$0.13
Total interest paid in 2010	\$3.99

**Transaction history**

Date	Check Number	Description	Deposits/ Additions	Withdrawals/ Subtractions	Ending daily balance
1/11	^10926	Kinecta Fcu Check Pymt 10926		100.00	
1/11	10931	Check		80.10	1,968.92
1/12	10932	Check		75.00	1,893.92
1/13	10933	Check		7.90	
1/13	10936	Check		1.90	1,884.12
1/14	10935	Check		22.07	1,862.05
1/18		ATM Withdrawal - 01/18 Mach ID 1079B 210 Michigan Ave Orofino ID 9288 0009263		60.00	
1/18	10929	Check		135.00	
1/18	10930	Check		89.00	1,578.05
1/19	^10937	Target Bank Checkpayment 110119 10937 00001496318		188.57	1,389.48
1/20	10927	Check		199.61	
1/20	10940	Check		38.36	1,151.51
1/24	10941	Check		121.00	1,030.51
1/26	^10942	Frontier 13 Arc Bill Pymt 110125 10942 0000000301251003906656		43.34	
1/26	10945	Check		27.47	959.70
1/28	10946	Check		75.00	
1/28	10944	Check		19.43	865.27
1/31	10951	Check		7.41	857.86
2/2	^10947	Dish Network Bill Pymt 110201 10947 *****3655		68.99	
2/2	10953	Check		39.98	748.89
2/3		Interest Payment	0.05		
2/3		Transfer From DDA # 00000000000000000000	1,595.00		
2/3	10950	Check		73.11	
2/3	10949	Check		7.90	2,262.93
2/4	10948	Check		14.69	
2/4	10938	Check		3.72	2,244.52
2/7	10922	Check		49.57	
2/7	10943	Check		48.43	
2/7	10934	Check		37.18	
2/7		Interest Payment	0.02		
<b>Ending balance on 2/7</b>					<b>2,109.36</b>
<b>Totals</b>			<b>\$1,595.07</b>	<b>\$1,634.73</b>	

The Ending Daily Balance does not reflect any pending withdrawals or holds on deposited funds that may have been outstanding on your account when your transactions posted. If you had insufficient available funds when a transaction posted, fees may have been assessed.

^ **Converted check:** Check converted to an electronic format by your payee or designated representative. Checks converted to electronic format cannot be returned, copied or imaged.

EXHIBIT

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**Summary of checks written** (checks listed are also displayed in the preceding Transaction history)

Number	Date	Amount	Number	Date	Amount	Number	Date	Amount
10922	2/7	49.57	10935	1/14	22.07	10945	1/26	27.47
10926 *	1/11	100.00	10936	1/13	1.90	10946	1/28	75.00
10927	1/20	199.61	10937	1/19	188.57	10947	2/2	68.99
10929 *	1/18	135.00	10938	2/4	3.72	10948	2/4	14.69
10930	1/18	89.00	10940 *	1/20	38.36	10949	2/3	7.90
10931	1/11	80.10	10941	1/24	121.00	10950	2/3	73.11
10932	1/12	75.00	10942	1/26	43.34	10951	1/31	7.41
10933	1/13	7.90	10943	2/7	48.43	10953 *	2/2	39.98
10934	2/7	37.18	10944	1/28	19.43			

\* Gap in check sequence.

Read the latest updates about the integration efforts under way between Wells Fargo and Wachovia. Visit [wellsfargo.com/wachovia/news](http://wellsfargo.com/wachovia/news).

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EXHIBIT H

Page 3 of 7 Pages





### General statement policies for Wells Fargo Bank

\$2101.36

+ \$ \_\_\_\_\_

= \$ 37,4136

- \$ \_\_\_\_\_

= \$1427.50

- You do not have to pay any amount in question while we are investigating, but you are still obligated to pay the parts of your bill that are not in question. While we investigate your question, we cannot report you as delinquent or take any action to collect the amount you question.

Case No. CV2012-277Filed 11/20/12 ✓at 4:10 o'clock P M

Karin Seubert  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813

By SD Clerk  
 Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

Case No. CV 2012-00277

**RESPONDENT'S REPLY BRIEF IN  
 SUPPORT OF MOTION TO DISMISS**

COMES NOW Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., hereby submits this *Respondent's Reply Brief in Support of Motion to Dismiss*. Said *Motion* is set for hearing on November 27, 2012.

Respondent's *Memorandum of Law* dated October 31, 2012 summarized the procedural and factual background of the case and the applicable law. This Reply Brief will not restate said background and argument. Instead, this Reply Brief is limited in scope to the points raised by Petitioner in his Brief dated November 13, 2012.

## I. ARGUMENT

In his *Response to Respondent's Motion to Dismiss* dated November 13, 2012 (hereinafter "Response"), Petitioner argues that his claims for breach of fiduciary duty survive his death, and that Petitioner additionally has separate claims for breach of trust, which survive his death under contract theory.

### A. Petitioner's claim for breach of fiduciary duty does not survive his death.

The parties agree that a claim for breach of fiduciary duty arises in tort. See generally *Memorandum of Law; Response*. Specifically, "a claim for a breach of a fiduciary duty is a negligence action in which the duty to act is created by the relationship between the parties." *Jones v. Kootenai County Title Ins. Co.*, 125 Idaho 607, 614, 873 P.2d 861, 868 (Idaho 1994). In the absence of statutory authority addressing the survivability of a claim, claims arising out of tort abate upon a claimant's death. See *Bishop v. Owens*, 152 Idaho 616, 620-21, 272 P.3d 1247, 1251-52 (2012).

As discussed in Respondent's initial brief, Idaho Code Section 5-327 governs the survivability of Petitioner's breach of fiduciary duty claims. As further discussed in said briefing, Petitioner's claim as it relates to acts from prior to July 1, 2010 do not survive his death because the prior language of said statute provide for the survivability of claims only after the death of the wrongdoer, not the death of the injured party.

Said statute was amended effective July 1, 2010 to allow for the survivability of tort claims after the death of the injured party in limited instances. The parties disagree on whether one such limited instance is found here. Petitioner contends that Respondent's alleged breach is ongoing from July 1, 2010 and that because his alleged damages are neither noneconomic and economic damages, said damages should be deemed to be property damage for purposes of Idaho

Code Section 5-327(2). See *Response* at 7-8.

However, parsing of whether the alleged damages are property damage or not is unnecessary because of the express limitation of recoverable damages in such actions: medical expenses actually incurred, other out-of-pocket expenses actually incurred, and loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence. I.C. § 5-327(2). Petitioner concedes that “[t]he petitioner is not arguing ... loss of wages or medical expenses.” *Response* at 8 (emphasis added). Instead, petitioner describes the damages sought as follows: “he has suffered a direct loss as result of the destruction of his interest in the Trust property.” *Id.* (emphasis added).

Based on Petitioner’s admissions, the only question that remains is whether said alleged damages for “direct loss as result of the destruction of his interest in the Trust” falls within the scope of recoverable damages for “out-of-pocket expenses actually incurred.” *Response* at 8; I.C. § 5-327(2). It clearly does not because under Petitioner’s theory of the case, he was allegedly denied disbursement of his share of the Trust proceeds, so by definition had no “out-of-pocket expenses actually incurred.”

The only allegations which could possibly constitute an out-of-pocket expense relate to \$3,000.00 of death benefits received by Petitioner under Michael Cornell’s International Brotherhood of Electrical Workers Benefit Fund. See *Affidavit of Margaret M. Watkins* at ¶ 4. Ms. Watkins alleges that Respondent “demanded” that Petitioner turn said funds over to Respondent and he ultimately turned over \$2,500.00 after spending \$500.00 on his own living expenses.<sup>1</sup> *Id.*

---

<sup>1</sup> Respondent notes that the dates of the subject letter and remittance of \$2,500.00 from Petitioner to Respondent are in January and February 2010, respectively, both of which are prior to the statutory amendment to Idaho Code Section 5-327 discussed above.



There is no dispute that Petitioner was the named beneficiary of said death benefits, not the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell. *Id.* at ¶ 4, attached letter dated January 21, 2010. What Petitioner chose to do with said funds, even if he later regretted it, does not change their character: said funds were Petitioner's property, not property of the Revocable Family Trust of Michael S. Cornell and Arile M. Cornell. Because said funds were not a Trust asset, then Respondent's alleged demands or actions related to said death benefit cannot be considered a breach of her fiduciary duty as trustee, even if they had occurred after July 1, 2010. Said death benefit simply has no relation to the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell, or this proceeding.

No other factual allegations have been made to support the conclusion that Petitioner suffered actual "out-of-pocket expenses" as a result of Respondent's actions after July 1, 2010. Instead, the facts alleged indicate that Petitioner would have applied said funds to medical and living expenses if said funds had been available, but did not obtain said services due to lack of available funds. See *Affidavit of Margaret M. Watkins* at ¶¶ 6, 8, and 9. There are no allegations before the Court that Petitioner suffered actual "out-of-pocket" damages from Respondent's alleged breach of her fiduciary duty as trustee or any other damages that are recoverable after his death.

As discussed above, "a claim for a breach of a fiduciary duty is a negligence action[.]" *Jones v. Kootenai County Title Ins. Co.*, 125 Idaho 607, 614, 873 P.2d 861, 868 (Idaho 1994). It is well established under Idaho law that a "cause in negligence includes proof of: (1) a duty, recognized by law, requiring the defendant to conform to a certain standard of conduct; (2) a breach of duty; (3) a causal connection between the defendant's conduct and the resulting injuries; and (4) actual loss or damage." *West v. Sonke*, 132 Idaho 133, 142, 968 P.2d 228, 237

(1998) (citing *Brooks v. Logan*, 127 Idaho 484, 489, 903 P.2d 73, 78 (1995); *Black Canyon Racquetball Club, Inc. v. Idaho First Nat'l Bank, N.A.*, 119 Idaho 171, 175-76, 804 P.2d 900, 904-05 (1991); *Alegria v. Payonk*, 101 Idaho 617, 619, 619 P.2d 135, 135 (1980)).

Petitioner's response to a request for summary judgment "must set forth specific facts showing that there is a genuine issue for trial." *Shere v. Pocatello School Dist. No. 25*, 143 Idaho 486, 489-90, 48 P.3d 1232, 1235-36 (citing I.R.C.P. 56(c)). For the reasons discussed above, Petitioner's response does not show that there is a genuine issue for trial because there are no alleged facts to support the conclusion that Petitioner suffered actual loss or damage of actual "out-of-pocket" expenses as a result of Respondent's actions as trustee prior to his death.

Because there is no genuine issue as to any material fact and Respondent is entitled to judgment as a matter of law, summary judgment must be granted. I.R.C.P 56(c).

**B. Petitioner's claims for breach of trust should be dismissed.**

Petitioner contends that in addition to Respondent's alleged breach of fiduciary duty as trustee, Respondent has a claim for breach of trust arising in contract.

Respondent relies upon *Cruzen v. Boise City*, 58 Idaho 406, 74 P.2d 1037 (1937), to support his argument that a breach of trust arises in contract. Respondent disagrees with Petitioner's analysis of *Cruzen*, which Respondent contends is limited in scope as opposed to establishing a general principle that a claim for breach of trust arises in contract. Further, the *Cruzen* decision is distinguishable from the facts at hand. Said case involved a dispute over liability a municipal corporation owes to bondholders for a deficiency in the collection of assessments due to embezzlement by the city clerk of the levied special assessments. *Id.* at 408, 74 P.2d at 1039. The *Cruzen* Court held that the subject bonds constituted an enforceable contract between the city and its bondholders and was not time barred. *Id.* at 415-417, 74 P.2d at

1046-48 (declining to consider whether statute concerning safekeeping of money by a county or the statute of limitations for breach of contract was implicated).

The relationship between a bondholder and municipal corporation issuing bonds clearly conforms with the general requirements of an enforceable contract: offer, acceptance, meeting of the minds, and consideration. *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992); *Haener v. Adam Co. Highway Dist.*, 108 Idaho 170, 697 P.2d 1184 (1985); *Gyurkey v. Babler*, 103 Idaho 663, 651 P.2d 928 (1982); *Vance v. Connell*, 96 Idaho 417, 529 P.2d 1289 (1974).

No such contractual relationship between the successor trustee and beneficiary of a trust exists. Just because a written document (the Trust Agreement) is implicated, this does not establish a contractual relation between Petitioner and Respondent nor a potential claim by Petitioner against Respondent grounded in contract.

Instead, a review of applicable case law finds no Idaho decision directly addressing whether a claim for breach of trust arises in tort, contract or equity. The Washington Court of Appeals addressed this question in *Foster v. Gilliam*, 165 Wn.App. 33, 268 P.3d 945 (Wash. App. Div. 1 2011), in the context of a dispute concerning a revocable living trust as follows:

This case arises from probate. A probate court is a court of equity. The Trust and Estate Dispute Resolution Act gives broad authority to the courts to administer and settle all estate and trust matters. ... We have reasoned that **claims for breach of trust are equitable in nature**. This is in accord with the general recognition that a trust beneficiary's remedies are equitable in origin and depend upon the application of equitable principles.

165 Wn.App. at 39-40, 40-41, 268 P.3d at 951-52, 952-53 (emphasis added, citations omitted).

Being equitable in nature, a claim for breach of trust is neither grounded in tort nor in contract. As such, Petitioner's claims of breach of trust should not be treated as non-abated breach of contract claims as Petitioner contends, but instead as claims in equity that do abate

upon Petitioner's death.

Even if Petitioner is correct that a claim for breach of trust survives his death under contract law principles, it is further appropriate for the Court to consider whether Petitioner's alleged breach of trust claims are appropriately characterized as such. Petitioner describes Respondent's alleged three breaches of trust as follows:

1. "Encouraging" the surviving grantor during his lifetime to amend the terms of the Trust (see *Response* at 8-9);
2. Failing to divide the trust income and principal remaining in the Trust to the two equal shares during Petitioner's lifetime (see *Response* at 9); and
3. Failing to provide a periodic accounting (see *Response* at 9-10).

This Memorandum will briefly discuss each in turn.

First, as to the alleged "encouragement" by Respondent to surviving grantor Michael Cornell to amend the terms of the Trust, said alleged acts are not supported by an affidavit and, even if they were, are beyond the scope of Petitioner's Petition and this litigation. See *Petition for Supervised Administration and Removal of Trustee* dated July 9, 2012. Said alleged acts occurred on or around August 6, 2009, prior to Michael Cornell's death and prior to authority as successor trustee vesting in Respondent. See *Affidavit of Karin Seubert* dated September 14, 2012 at ¶ 4, Exh. B.; *Response* at 8-9. Said alleged acts have no relevance to Respondent's alleged action or inaction as trustee as she had no authority as trustee at that time. Instead, if the Amendment was invalid as being executed after Arlie Cornell's death as Petitioner implies, then Petitioner would have remained co-trustee and had authority to act under the original terms of the Trust. See *Affidavit of Karin Seubert* dated September 14, 2012 at Exh. A. Petitioner failed to assert said authority during his lifetime and this issue is moot in light of his death. More importantly for consideration of summary judgment, said allegations are not probative to whether supervision of the Trust or removal of Respondent as Trustee is appropriate, thus do not

preclude summary judgment.

---

Second, as for Respondent's alleged failure to divide the trust income and principal between the two beneficiaries during Petitioner's lifetime, Petitioner makes no distinction how said alleged acts constitute "breach of trust" when the same actions or inactions are also alleged to be a breach of Respondent's fiduciary duty as trustee. See *Response* at 7 ("The respondent, Toni C. Johnson, who was the successor trustee, **breached her fiduciary duty** to abide by the terms of the Trust and distribute the income and principal of Trust equally to its beneficiaries after Michael C. Cornell's death.") and at 9 ("the respondent failed to divide the trust income and principal remaining in the Trust into two equal shares and distribute them to herself and her brother, petitioner, John H. Cornell. Said failure is a **breach of the trust term** in Section 4.03") (emphasis added in both quotations).

The Idaho Courts have looked to the Restatement (2nd) of Torts in analyzing actions for breach of trust as follows:

If the trustee commits a breach of trust, he is chargeable with any profit which would have accrued to the trust estate if he had not committed such breach of trust. On the other hand, if the trustee commits a breach of trust and if a loss is incurred, the trustee may not be chargeable with the amount of the loss if it would have occurred in the absence of a breach of trust.

...

A trustee is guilty of a breach of trust if he knowingly pays more than he should have paid for an item, and he is chargeable with the difference between what he paid and the market value of the item

*Pickering v. El Jay Equipment Co., Inc.*, 108 Idaho 512, 517, 518, 700 P.2d 134, 139, 140 (App. 1985) (citing Restatement (2d) of Trusts § 205 comments e, i and f (1959)). This analysis reflects the application of breach of trust in terms of the management or potential mismanagement of trust assets, not the alleged violation of a duty as Petitioner argues has occurred here. As such, said alleged actions or inactions do not constitute a breach of trust, but

instead are appropriately characterized as a breach of fiduciary duty alone.

Third, as for the alleged lack of periodic accounting, said claim is also duplicative of one of Petitioner's claim for breach of fiduciary duty and is more appropriately characterized only as such. The presence or lack of periodic accounting does not impact the profits or principal of the trust assets as the principles from *Pickering, infra*, assume. Instead, said alleged lack of accounting relates to a trustee's fiduciary duty to the beneficiaries, so when violated, constitute a breach of fiduciary duty alone. As discussed above, said claim arises in tort and does not survive Petitioner's death.

For these reasons, Petitioner's claims for breach of trust are either outside the scope of this litigation or more properly considered to be claims for breach of fiduciary duty, which do not survive Petitioner's death. See *infra*. Respondent is therefore entitled to summary judgment as a matter of law.

**C. No substitution of parties has occurred.**

Last, Rule 25(a)(1) of the Idaho Rules of Civil Procedure allows dismissal of an action as to a deceased party if no substitution of parties is made within a reasonable time. Here, the record of the case reflects that Petitioner's first informed the Court of Petitioner's death on August 21, 2012. Nearly three months have passed since said date of death. No *Motion for Substitution of Parties* has been filed by a successor or representative of the deceased party as of the date of this Reply Brief. The hearing on Respondent's *Motion to Dismiss* is now seven days away, so there is insufficient time for notice to be given in advance of a hearing on any subsequently filed *Motion for Substitution of Parties*.

For this additional reason, it is appropriate to grant summary judgment in favor of Respondent and to dismiss Petitioner's action in its entirety.



## II. CONCLUSION

Based on the foregoing, Respondent Toni Johnson respectfully requests that her Motion to Dimiss be granted and that John Cornell's *Petition* be dismissed with prejudice.

DATED this 20 day of November, 2012.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *RESPONDENT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS* was, this 20 day of November, 2012,

☐ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
☒ by first class mail; or  
☐ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

Case No. CV12-277  
Filed 11/27/12  
at 3:10 o'clock P  
C Bird  
By IK Clerk  
Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of

Petitioner,

vs.

Michael S Cornell, et al

Respondent.

CASE NO. CV12-277

COURT MINUTES

DATE: 11/27/12

TAPE: CD 470-2

TIME: 1:05

The Honorable Robinson Presiding.

Presiding Telephonically.

FOOT:

1:05 Judge discusses w/ attorneys

Continue to 1/8/12 1pm (give 2 hrs)

1:14 Briefing w/i 2wks of hearing date  
Beers

COURT MINUTES - page 1 of \_\_\_\_\_

\_\_\_\_\_ - Deputy Clerk

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544

Case No. CV12-277  
Filed 11/27/12  
at 3:15 o'clock P  
CBled  
Clerk IC  
By IC

In The Matter Of

Michael S. Cornell, etal.

Case No: CV-2012-0000277

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Hearing Scheduled  
Judge:  
Courtroom:

Tuesday, January 08, 2013  
Randall W. Robinson  
Magistrate Courtroom

01:00 PM

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on November 27th, 2012.

DARREL W. AHERIN

P.O. BOX 698 1212 IDAHO ST.

LEWISTON ID 83501-0698 ☒ Mailed ☐ Hand Delivered ☐ Faxed

KARIN SEUBERT

P.O. BOX 854

LEWISTON ID 83501 ☒ Mailed ☐ Hand Delivered ☐ Faxed

THEODORE O. CREASON

P.O. DRAWER 835

LEWISTON ID 83501 ☒ Mailed ☐ Hand Delivered ☐ Faxed

Dated: November 27th, 2012

Carrie Bird

Clerk Of The District Court

By: 

Deputy Clerk

DOC22cv 7/96

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, AND FOR THE COUNTY OF IDAHO

IN THE MATTER OF	)	CASE NO. CV2012-277
	)	
MICHAEL S. CORNELL, ETAL	)	COURT MINUTES
	)	
	)	
	)	

\_\_\_\_\_  
Randall W. Robinson, Presiding Judge

Courtney Baker: Deputy Clerk

Other Parties Council:

Other Parties Council:

Date: 01/8/2013 Time: 1:18 – 2:07 p.m. Tape: CD554-1

Subject of proceeding: Motion

=====

FOOTAGE:

1:18 Honorable Randall W. Robinson, Magistrate Judge, presiding. Parties present in the court room: Mr. Aherin, and Ms. Seubert.

1:19 Court advices that he has read both briefs.

1:19 Ms. Seubert gives a brief history of the case.

1:24 Ms Seubert addresses the legal theories that are before the court, the alleged breach of trust.

1:30 Ms. Seubert states that Summary Judgment is warranted, because there are no claims that survive John Cornell's death, therefore, the claim should be dismissed.

1:30 Court states that the Idaho Code is not broad enough for this matter.

---

1:33 Mr. Aherin argues that John was denied any information about the trust.

1:45 Mr. Aherin continues to argue his points.

1:48 Court addresses checks written by Ms. Seubert's client.

2:06 Court is in recess.

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544



In The Matter Of

Michael S. Cornell, etal.

Case No: CV-2012-0000277

**NOTICE OF HEARING**

**NOTICE IS HEREBY GIVEN** that the above-entitled case is hereby set for:

**Motion to Dismiss Hearing**

**Wednesday, February 06, 2013**

**02:00 PM**

Judge:

Randall W. Robinson

Courtroom:

Magistrate Courtroom

**Briefing Schedule:**

**Theodore O. Creason must submit Brief by January 23, 2013**

**Reply Briefs due by February 1, 2013**

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on January 11th, 2013.

Darrel W. Aherin P.O. Box 698, Lewiston, ID, 83501-0698

Karin Seubert P.O. Box 854, Lewiston, ID, 83501

Theodore O. Creason P.O. Drawer 835, Lewiston, ID, 83501

Dated: January 11th, 2013

Carrie Bird

Clerk Of The District Court

By:

*Jodie Allaire*  
Deputy Clerk



DOC22cv 7/96



Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
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Attorneys for Kareen Cornell, Surviving Spouse  
Of John Henry Cornell



**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

)  
) Case No. CV 2012-00277  
)

) **MEMORANDUM**  
)

) **RE: RESPONDENT'S MOTION TO**  
) **DISMISS**  
)

**I. PRELIMINARY STATEMENT**

This case was instituted to protect John Cornell's interests in property held in trust by the trustee of the The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell. In his petition, John Cornell set forth facts showing that the trustee, Toni Johnson, was (1) acting without proper authority as trustee, (2) abusing and diminishing the trust res, and (3) attempting to diminish or extinguish his property interests. John Cornell died before his rights in the property could be adjudicated and his demand for distribution could be granted. Toni Johnson seeks dismissal of this action on the grounds that (A) the Estate of John H. Cornell failed to timely substitute into this action pursuant to Idaho Rule of Civil Procedure 25; and (B) John



Cornell's causes of action did not survive his death. In regard to her Rule 25 arguments, Johnson failed to raise Rule 25 as a grounds for dismissal in her motion, instead attempting to incorporate it as a ground for dismissal through argument in her Reply Brief. It must be recognized that the Estate holds a strong interest in protecting the property rights of the deceased by being substituted into this action upon resolution of the dispute regarding the proper personal representative.

In regard to the survival of the causes of action pled in this case, both common law and statutory law support a finding that causes of action regarding property rights survive the death of the claimant. Further, Johnson premises her arguments upon the assumption that there exists no genuine issue as to her entitlement of the entirety of the trust res. Johnson's entitlement to the trust res is an issue that requires briefing and, almost assuredly, discovery into whether she engaged in inequitable conduct while acting in a fiduciary capacity for the decedent.

Johnson's motion should be denied.

## **II. FACTS & PROCEDURE**

John Henry Cornell ("John") instituted this action on July 11, 2012. John petitioned the Court to, among other things, remove Toni C. Johnson as trustee of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell ("the Trust") and order that the trust be subject to supervised administration. John's petition seeks relief based upon claims that (1) Johnson's service as sole trustee of the Trust conflicts with the terms of the Trust, ¶¶ 5-6; (2) Johnson failed to provide an inventory of the assets of the Trust, as required by law, ¶ 7; (3) Johnson failed to distribute the Trust res in accordance with the terms of the Trust, ¶¶ 8-9, 11; and (4) Johnson has misused assets of the Trust, ¶¶ 9-10.

John died on August 20, 2012. John is survived by his spouse, Kareen Cornell ("Kareen"). He is also survived by his sister, Johnson, and his aunt, Margaret Watkins. It is believed by all parties involved in this matter that John died without issue.

On September 14, Johnson filed her motion to dismiss this case. Johnson argued for dismissal on the ground that the issue of survivability is governed by the common law. Johnson argues that John's claims sound in tort and, therefore, do not survive his death under the common law. Johnson premised this argument upon the assumption that she is entitled to the entirety of the Trust res. Johnson assumes, without argument, that the Trust res did not vest in the beneficiaries until after John's death—at which time it vested in Johnson.

On November 13, Watkins filed a Petition for Formal Probate of the Estate of John C. Cornell ("the Estate"), by and through attorney Darrel Aherin. Watkins sought appointment as Personal Representative of the Estate based upon her position as a creditor of the Estate. She also proffered a document purported to be John's will.

On November 15, Watkins was appointed temporary personal representative in the Estate case. That same day, a memorandum in opposition to Johnson's motion to dismiss was filed by Mr. Aherin. Mr. Aherin appears to have filed on behalf of the Estate. No substitution, however, has been made. In the memorandum, Mr. Aherin argues that (1) the issue of survivability is governed by statutory law, not common law—at least as to a number of claims; and (2) the claims of the petition sound in contract, which claims survive death at common law.

On November 20, Johnson filed a reply brief. In addition to arguing the points raised in Mr. Aherin's response brief, Johnson asked the Court to grant her motion to dismiss pursuant to

Idaho Rule of Civil Procedure 25(a)(1). Johnson's reply brief marks the first time she raised Rule 25(a)(1) as grounds for dismissal.

On November 27, Kareen filed an objection to Watkin's petition in the Estate case. On December 19, Kareen filed (1) a petition for formal adjudication of intestacy and formal appointment of Kareen as personal representative; (2) a memorandum in support of her petition, setting forth the invalidity of Watkin's purported will; and (3) a motion asking the Court to restrain Watkins from taking any action on behalf of the Estate until such time as the Court could rule on Kareen's petition.

### III. ANALYSIS

**A. The Court should deny Johnson's request for dismissal pursuant to Idaho Rule of Civil Procedure 25(a)(1) and allow the Estate to substitute into the action for John.**

It has long been the law in Idaho that an action cannot be continued in the name of a deceased, on behalf of his heirs, without substitution of the deceased's representative or successor in interest. *See Arthur v. Kilpatrick Bros. Co.*, 47 Idaho 306, 274 P. 800 (1929). Idaho Rule of Civil Procedure 25(a)(1) sets forth the process for substitution of the deceased party's representative. Johnson seeks dismissal of this action based upon the argument that John's representative has failed to substitute into the action in a timely manner; a ground Johnson raises for the first time in her reply brief. However, the failure to effect substitution has not been the result of unnecessary delay or disinterest, but rather the result of a dispute as to the proper representative of the deceased. Therefore, the Court should deny Johnson's request for dismissal and should grant the anticipated motion for substitution of the Estate.

Motions seeking a court order must set forth the grounds of the motion with particularity. Idaho R. Civ. P. 7(b)(1); *see also Idaho Mercantile Co. v. Kalanquin*, 7 Idaho 295, 62 P. 925 (1900) (applying the requirement of particularity to motions for nonsuit). Johnson's motion set forth a single ground for her motion: that John's claims were rendered moot because the Trust res vested entirely in her at the time of John's death and all other claims of the petition abated upon death. A claim of mootness and abatement rests upon different dispositive facts than a claim of failure to timely substitute. Therefore, the Court should not consider failure to timely substitute as a ground for dismissal.

Even if the Court does consider Johnson's Rule 25(a)(1) argument, it fails on its merits. Dismissal for failure to timely substitute is left to the discretion of the Court. *See Idaho R. Civ. P. 25(a)(1)* (using the permissive *may* rather than the compulsory *must*). In determining whether a party ought to be nonsuited for delay, the Court should consider the length of delay, the prejudice caused by the delay, and the reason for delay. *See Gerstner v. Washington Water Power Co.*, 122 Idaho 673, 677, 837 P.2d 799, 803 (1992) (analogous case law on motions to dismiss based upon lack of prosecution). First, this case has been delayed approximately three months. Three months is a relatively short delay when compared to the rate of prosecution in the average civil action. Second, Johnson has not made any showing of actual prejudice caused by the delay.

Third, the justification for delay provides even stronger support for excusing the delay. Watkins is currently the only person entitled to represent the Estate. However, Kareen has opposed Watkins' appointment based upon her priority to act as personal representative as John's surviving spouse, Idaho Code § 15-3-203, and the patent inadequacy of the Will which Watkins'

has proffered. Further, Kareen has requested that the Court restrain Watkins from taking any action on behalf of the Estate. Thus, the decedent's interests are represented by a temporary personal representative with an inferior and dubious claim to appointment, and a surviving spouse who has not been appointed to act on behalf of the Estate. Thus, the Court should first resolve who is the rightful personal representative and then entertain a motion for substitution. The propriety of this course of action is further supported by the uncertainty as to the preclusive effect any judgment entered before resolution of the Estate dispute would have on Kareen or the Estate.

Therefore, Kareen asks this Court to deny Johnson's request for dismissal pursuant to Idaho Rule of Civil Procedure 25(a)(1) as not properly before the Court. In the alternative, Kareen asks the Court deny the request on its merits, finding the delay excusable. Finally, Kareen asks the Court to entertain a motion for substitution from the rightful personal representative of the Estate, once that dispute has been resolved.

**B. The causes of action pled in the petition survive the death of John under both the common law and Idaho Code § 5-327(2).**

The causes of action pled in the petition survive the death of John under both the common law and Idaho Code § 5-327(2) because they are actions regarding an interest in property. In the petition, John sought compensation for the diminution and attempted extinction of his interest in the Trust res. The petition alleges that Johnson engaged in misfeasance and malfeasance that caused injury to the real and personal property of the Trust. At its core, the action seeks to (1) obtain reimbursement of the Trust for all diminishment resulting from wrongful acts and (2) compel distribution of the Trust res. Actions seeking to adjudicate

property rights and order proper distribution of the subject property survive the death of the claimant under both the common law and the relevant statutory provisions.

Johnson premises her argument regarding the survivability of this action upon the assumption that the entirety of the Trust res has vested in her. This conclusion is neither conceded by Kareen nor is it clear under the law. Several legal issues must be fully briefed and presented before the Court, including (1) whether distribution can serve as the proper event for vesting; (2) if so, whether the law presumes vesting within a reasonable period of time regardless of actual distribution; (3) whether the terms of vesting in the Trust violate the common law or statutory rule against perpetuities as to both Johnson's and John's interest; and (4) whether Johnson's conduct resulted in her holding that portion of the Trust res due to John in a constructive trust for the benefit of John and his heirs. The lack of briefing on these issues call into question Johnson's assumed premise.

Many of the equitable theories under which John's heirs might recover give rise to genuine issues of material fact. Those theories are often dependent upon the establishment of improper conduct; a triable issue of fact. Because triable issues of material fact remain, the motion to dismiss should be denied. Idaho R. Civ. P. 56(c). For example, constructive trusts arise where "one party obtains the legal title to property, not only by fraud or by violation of confidence of fiduciary relations, but in any other unconscientious manner." *Hanger v. Hess*, 49 Idaho 325, 328, 288 P. 160, 161 (1930). The result of such conduct is that the Court, ruling in equity, "impress[es] a constructive trust on the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner." *Id.* Specific



facts that may give rise to the creation of a constructive trust were set forth in the Affidavit of Margaret M. Watkins, filed with the Court on November 15, 2012.

The common law governs the issue of survivability of an action upon death of the injured party in all actions where the injured party's cause of action arose prior to July 1, 2010. *See Bishop v. Owens*, 152 Idaho 616, 619 (2012). Johnson's argument on survival under the common law relies upon the analysis in *Bishop*. The *Bishop* Court set forth the general rule regarding survival of claims at common law: "Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate." *Id.* This case, however, does not fall under that general rule. The cause of action before the *Bishop* Court sounded in "pure tort" as it was for attorney malpractice. The cause of action did not involve a claim to property held in trust by another.

While the *Bishop* Court identified the general rule, the common law is more nuanced in cases involving property. In such cases, the survival of an action depends upon the nature of the interest affected.

At common law survivable actions are those in which the wrong complained of affects primarily property and property rights, and in which any injury to the person is incidental, while nonsurvivable actions are those in which the injury complained of is to the person and any effect on property or property rights is incidental. . . .

. . . The general rule is that, in addition to the causes of action arising out of contract recognized at common law, causes of action arising from torts to real and personal property survive and pass to the personal representative of the decedent, while purely personal torts do not survive in the absence of statutory provision.

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 51. "All causes of action arising from torts to real or personal property, by which its value is diminished, as well as actions based on contract,

are generally assignable and survive and pass to the executor or administrator.” 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 56. Thus, in cases where the injured party alleged an injury to his property—such as the existence or amount of his interest in a trust—the claim survives. See *Henshaw v. Miller*, 58 U.S. 212 (1854) (cause for taking of chattels survives). See also, *Barnes v. Barnes*, 135 Idaho 103, 105, 15 P.3d 816, 818 (2000) (holding that issues regarding property survive).

The survivability of this action is further supported by the fact that it arises pursuant to a remedial statute and that it is equitable in nature. The petition seeks recovery based upon a trustee’s breach. A cause of action which is founded under Idaho Code §§ 15-7-101 through 15-7-601. “A cause of action that is founded on a remedial statute . . . survives the death of the party possessing the cause of action.” 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 59. Further, the causes of action pled here are equitable in nature—as noted by Johnson in her Reply Brief.

The principle that a cause of action expires with the death or disability of a party generally does not apply to suits in equity; equitable remedies exist to the same extent in favor of and against executors and administrators as they do against the decedent, as long as the court can continue to grant effective relief in spite of the death. One of the main reasons for this stance for suits in equity is that such suits primarily pertain to property rights.

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 60 (footnotes omitted). Thus, under the common law, the causes of action pled in this case survive John’s death.

Idaho Code § 5-327(2) governs the issue of survivability of an action upon death of the injured party in all actions where the injured party’s cause of action arose after July 1, 2010. While the causes of action in this case survive John’s death under the common law (as set forth above), the Idaho legislature made survival explicit in its enactment of section 5-327(2):

A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence. Such action shall be commenced or, if already commenced at the time of the death of the injured person, shall be thereafter prosecuted by the personal representative of the estate of the deceased person or, if there be no personal representative appointed, then by those persons who would be entitled to succeed to the property of the deceased person according to the provisions of section 5-311(2)(a), Idaho Code.

The facts pled in the petition give rise to an action against Johnson for the damage caused by her improper conduct. The alleged damage is diminution of the Trust res; a diminution in the value of the property interest John held in the Trust res. Johnson claims this action falls outside the scope of the term "property damage" because (1) the action "does not involve tangible property that was allegedly damaged [in] the common and ordinary meaning of the phrase," and (2) the action does not seek the limited damages available to a surviving action.

(1) Johnson does not provide a definition for the "common and ordinary meaning" of the term "property damage." One is left to assume that Johnson proposes that the term be confined to causes of action arising out of facts where the wrongdoer caused damage to tangible property through the application of physical force. No foundation exists for such a distinction in law. While the statute discusses the survivability of "causes of action", Johnson proposes an interpretation that would condition survivability based upon facts within the cause of action. For example, a trespass to chattels cause of action would survive where the trespass was in the form of physical contact, but not where the trespass took the form of barring the owner's access to the property.

(2) Johnson attempts to limit recovery on all actions surviving pursuant to Idaho Code § 5-327(2) to those grounds set forth in the second sentence of the subsection. Johnson's interpretation fails to account for the limited applicability of the second sentence. Subsection (2) governs the survivability of causes of action for personal injury *or* property damage. The second sentence of the subsection limits recovery where the suit seeks damages for injury to a deceased person. Statutory provisions are to be interpreted in accord with common sense and reason. *Smith v. Dep't of Employment*, 100 Idaho 520, 522, 602 P.2d 18, 20 (1979). Interpreting Idaho Code § 5-327(2) in a manner that limits recovery in property damage causes of action to the grounds set forth in the second sentence conflicts both with common sense and reason.

Both the common law and Idaho Code § 5-327 support a ruling that the causes of action set forth in this case survive the death of John. If the deceased held a property interest at the time of death, that interest falls into the estate, where it is later distributed to the beneficiaries. The alleged wrongdoer does not get to convert the deceased's property to her own simply because the deceased did not survive to the point of judgment. Kareen asks this Court to reject Johnson's proposed interpretations would result in an unjust and inequitable conclusion.

**C. Granting Johnson's motion to dismiss would not be in the interest of justice because it would only result in duplicative litigation.**

In the event that the Court granted Johnson's motion to dismiss, Kareen could file a petition for a judicial proceeding declaring the Estate's rights or legal relations to the Trust pursuant to the Idaho Trust and Estate Dispute Resolution Act, Idaho Code §§ 15-8-101 through 15-8-305. The conduct alleged in the petition is the same as that which would be set forth in a

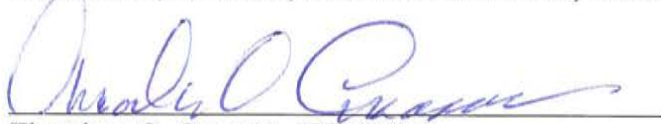
TEDRA action instituted by Kareen or the Estate. No proper purpose is served by requiring repetitive filing, causing additional costs and fees.

#### IV. CONCLUSION

Kareen asks this Court to deny Johnson's motion to dismiss.

DATED this 17th day of January, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Theodore O. Creason, ISB #1563

Attorneys for Surviving Spouse, Kareen Cornell

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of January, 2013, I filed the foregoing MEMORANDUM RE: RESPONDENT'S MOTION TO DISMISS with the Clerk of the Court, and provided a paper copy to the following persons:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501

\_\_\_\_\_  
x \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

FIRST-CLASS MAIL  
HAND DELIVERED  
OVERNIGHT MAIL  
FAX TRANSMISSION

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

\_\_\_\_\_  
x \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

FIRST-CLASS MAIL  
HAND DELIVERED  
OVERNIGHT MAIL  
FAX TRANSMISSION



Theodore O. Creason, ISB #1563



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

MOTION TO MEDIATE

COMES NOW the petitioner by and through her attorney, Darrel W. Aherin of Aherin, Rice & Anegon, and hereby requests the Court set this case for mediation. This motion is made pursuant to I.R.C.P. 16(k)(A). Petitioner believes a mediation would be beneficial to reaching a resolution in this case and *In the Matter of the Estate of John Henry Cornell*, Clearwater County Case No. CV 2012-439. If the parties are not able to agree on a mediator, a request will be made for the Court to designate a mediator.

Oral argument is requested.

DATED this 1<sup>st</sup> day of February, 2013.

AHERIN, RICE & ANEGON

By: Darrel W. Aherin

Darrel W. Aherin  
Attorney for Petitioner



CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 1<sup>st</sup> day of February, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile
- ☐ Federal Express

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile
- ☐ Federal Express

  
\_\_\_\_\_  
DARREL W. AHERIN

Karin Seubert  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

Case No. CV 2012-00277

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )  
 \_\_\_\_\_ )

**RESPONDENT'S BRIEF IN REPLY  
 TO BRIEF OF SURVIVING SPOUSE**

COMES NOW Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., hereby submits this *Respondent's Brief in Reply to Brief of Surviving Spouse*. Respondent's subject *Motion to Dismiss* is set for further hearing on February 6, 2013.

Respondent's *Memorandum of Law* dated October 31, 2012 summarized the procedural and factual background of the case and the applicable law. This Reply Brief will not restate said background and argument. Instead, this Reply Brief is limited in scope to the points raised by the *Memorandum re: Respondent's Motion to Dismiss* dated January 17, 2013 and filed by Kareen Cornell (hereinafter "Mrs. Cornell"), surviving spouse of John H. Cornell, by and through counsel.

BRIEF IN RESPONSE TO SURVIVING SPOUSE

## I. ARGUMENT

In her *Memorandum* dated January 17, 2013 (hereinafter "*Memorandum*"), Mrs. Cornell contends that dismissal of this action is not proper pursuant to Rule 25(a)(1) of the Idaho Rules of Civil Procedure, that the causes of action in this case survive the death of John H. Cornell, , and that judicial economy precludes dismissal. This Brief will address each in turn.

### A. Dismissal pursuant to I.R.C.P. 25(a)(1) is appropriate.

In her *Memorandum*, Mrs. Cornell argues that Respondent's request for dismissal pursuant to Rule 25(a)(1) of the Idaho Rules of Civil Procedure is not properly before the Court because it was not cited to in the *Motion to Dismiss*, but instead was not raised until Respondent's *Reply Brief*. As the record of the case reflects, the subject *Motion to Dismiss* is dated September 17, 2012 - within one month of Mr. John Cornell's death. Said *Motion* was original set for hearing on October 1, 2012; then continued to November 27, 2012; then further continued to January 8, 2013, which took place; and then subsequently re-opened and re-set for February 8, 2013 to allow further opportunity to Mrs. Cornell to be heard. As of the February 8, 2013 hearing, Mr. John Cornell, the Petitioner in this action, will have been deceased for nearly six months (the six month anniversary of his death being only 12 days later).

When the *Motion to Dismiss* was prepared on September 17, 2012, a reasonable time frame had not yet passed after the death of Mr. John H. Cornell where it would have been appropriate to include Rule 25(a)(1) of the Idaho Rules of Civil Procedure as a potential grounds for dismissal. Respondent could not have foreseen the long and contentious path that this litigation has taken since that time.

During the nearly six month period since Mr. Cornell's death, no *Motion for Substitution*

BRIEF IN RESPONSE TO SURVIVING SPOUSE

has been filed by either the temporary personal representative, or by Mrs. Cornell. Rule 25(a)(1) of the Idaho Rules of Civil Procedure provides that "[i]f substitution is not made within a reasonable time, the action may be dismissed as to the deceased party." More than a reasonable time has passed, and thus dismissal as to Mr. Cornell is appropriate and well within the discretion of the Court.

**B. The causes of action in this proceeding do not survive Mr. John Cornell's death.**

Mrs. Cornell asserts in her Memorandum that "the causes of action pled in the petition survive the death of John under both common law and Idaho Code § 5-327(2) because they are actions regarding an interest in property." *Memorandum* at 6 (emphasis added). Mrs. Cornell does not state her assessment of the legal basis for said claims other than potential, undefined "equitable theories." *Id.* As the previously submitted briefing discussed at length, this is an action for breach of fiduciary duty action arising out of Respondent's alleged misconduct as trustee of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell after the deaths of Michael and Arlie Cornell. See *Respondent's Reply Brief in Support of Motion to Dismiss* dated Nov. 20, 2012. Temporary Personal Representative of the estate of John H. Cornell, Margaret Watkins, has submitted briefing and argument in support of her position that the alleged facts also support an action for breach of trust arising in contract, but for reasons previously briefed and argued, the alleged facts fail to support a claim for breach of trust.

A claim for breach of fiduciary duty sounds in tort. See *Jones v. Kootenai County Title Ins. Co.*, 125 Idaho 607, 614, 873 P.2d 861, 868 (Idaho 1994) ("a claim for breach of fiduciary duty is a negligence action in which the duty to act is created by the relationship between the parties.")

BRIEF IN RESPONSE TO SURVIVING SPOUSE

The Idaho Supreme Court's reasoning the context of similar analysis of a legal malpractice claim is informative here:

As this Court previously recognized, legal malpractice actions are an amalgam of tort and contract theories. The tort basis of legal malpractice actions flows for the elements of legal malpractice: (a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damage to the client. The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained. Breach of an attorney's duty is negligence in tort. The contract basis of legal malpractice actions is the failure to perform obligations specified in the written contract. Thus, under the abatement rule, breach of duty is an action in tort, not contract; that is, unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney. Breach of that duty is a tort.

... [T]he contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct. If an attorney and client want to provide for a higher standard of care, they may do so by express language in the contract. Here, the standard of care in the contract is essentially the same as in any attorney-client relationship. Because this claim sounds in tort, it abated upon [the client's] death.

*Bishop v. Owens*, 152 Idaho 616, 620, 272 P.3d 1247, 1251 (2012) (citations omitted).

Similar to the attorney-client relationship at issue in *Bishop*, the contours of the duties owed by a trustee to trust beneficiaries are defined by the Uniform Probate Code and Principal and Income Act. Here, the trust documents contain no greater requirements than are set forth in said statutes. Therefore, the analysis of Idaho Code Section 5-327(2), and the common law rule of abatement prior to its amendment, applies. Based thereon, Mr. Cornell's claims for breach of fiduciary duty brought as a trust beneficiary against the trustee Respondent are abated upon his death for the reasons previously briefed.

Mrs. Cornell asserts that these claims are equitable in nature, thus do not abate, however cites only to treatises that contradict Idaho law to support said assertion. *Memorandum* at 8-9.

BRIEF IN RESPONSE TO SURVIVING SPOUSE

As discussed above and at length in prior briefing, the general rule under Idaho law is that claims arising in pure tort abate upon the death of the claimant. *Bishop v. Owens*, 152 Idaho 616, 620-21, 272 P.3d 1247, 1251-52 (2012). Despite the well-established nature of that principle, which Mrs. Cornell herself acknowledges, Mrs. Cornell proposes that this Court reject the clear principle established in *Bishop v. Owens* and instead draw a distinction between personal torts and property torts that has no basis in Idaho law. *Memorandum* at 8. She cites to no case law or statutory authority in support of this distinction, but instead relies upon a treatise, 1 Am.Jur.2d Abatement, Survival and Revival, without further authority or relation to Idaho law. *Id.*

Mrs. Cornell does cite to the Idaho decision of *Barnes v. Barnes*, 135 Idaho 103, 15 P.3d 816 (2000), however, said case was a divorce action where the husband died during the pendency of an appeal after entry of an interlocutory divorce. There, the surviving wife sought to “posthumously reunite the parties based on a procedural flaw in the motion for summary judgment.” *Id.* at 107, 15 P.3d at 820. The *Barnes* decision stands for the limited principle that where a divorced spouse dies prior to resolution of the division of community property and debts, the resolution of said division of property survives. *Id.* Said principle has no application to the Court’s determination of whether a breach of fiduciary duty claim survives the allegedly injured party’s death.

Mrs. Cornell further argues that this Court should adopt a broader definition of “property damage” in interpreting Idaho Code Section 5-327(2) than that proposed by Respondent. *Memorandum* at 10. Respondent disagrees with such expanded definition, however, as discussed at length in prior briefing, it is unnecessary for the Court to base its decision on the definition of “property damage” as even if the Court were to adopt Mrs. Cornell’s definition, there remains no



question that the damages sought in this action are not recoverable under Idaho Code Section 5-327(2): those permissible being expressly limited to medical expenses actually incurred, other out-of-pocket expenses actually incurred, and loss of earnings actually suffered. No such damages are plead or sought here. Mrs. Cornell has not asserted any facts to preclude dismissal.

Mrs. Cornell correctly notes that that Idaho law requires that statutory provisions be interpreted in accord with common sense and reason. *Memorandum* at 11 (citing *Smith v. Dep't of Employment*, 100 Idaho 520, 522, 602 P.2d 18, 20 (1980)). However, in this instance, interpretation of Idaho Code Section 5-327(2) in accordance with common sense and reason requires abatement of Mr. Cornell's claims upon his death and dismissal of this action.

For these reasons, Mr. Cornell's claims abated upon his death and should be dismissed.

**C. The causes of action in this proceeding do not survive Mr. John Cornell's death.**

Mrs. Cornell raises her potential right to file a lawsuit under the Trust and Estate Dispute Resolution Act, Idaho Code § 15-8-101 et seq., as further grounds to oppose dismissal of this lawsuit on a basis of judicial economy. *Memorandum* at 11. Said argument is entirely speculative in nature, inappropriately seeks to expand the scope of this proceeding, and should be disregarded by the Court. The Court has gone to great lengths to ensure that Mrs. Cornell have the opportunity to participate and be heard. She has done so. She has ample opportunity to raise questions relating to the interpretation of the Trust in other proceedings. Said issues are not properly before the Court.

Instead, this is an action for breach of fiduciary duty. The only question before the Court is whether said action survives the death of Mr. John Cornell. As discussed above and in prior briefing, based upon Idaho law, it does not and dismissal is required.

BRIEF IN RESPONSE TO SURVIVING SPOUSE

## II. CONCLUSION

Based on the foregoing, Respondent Toni Johnson respectfully requests that her Motion to Dimiss be granted and that John Cornell's *Petition* be dismissed with prejudice.

DATED this 1st day of February, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *RESPONDENT'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS* was, this 1st day of February, 2013, transmitted via facsimile to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

BRIEF IN RESPONSE TO SURVIVING SPOUSE

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

COURT MINUTES

CV-2012-0000277

The Matter of Michael S Cornell

Hearing type: Motion to Dismiss

CV2012-0000439

The Matter of the Estate of John Henry Cornell, Deceased

Hearing type: Court Trial

Hearing date: 02/06/2013

Time: 2:09 – 3:09

Judge: Randall W. Robinson

Courtroom: 001

Court reporter: None

Minutes Clerk: Jodie

Tape Number: CD551-1

2:09 The Honorable Randall W. Robinson presiding. Present in Court:

Ted Creason, Karin Seubert, Darrel Aherin

2:10 Mr. Aherin – Motion for Mediation

Court asks which case will be first.

2:11 Discussion addressing Briefs

2:28 Discussion continues addressing the Trust and Estate

2:32 Mr. Aherin – addresses the Trust Document; Terms of

2:35 Discussion continues Terms of the Trust and subject of Personal Representative

2:52 Mr. Creason inquires time for a Personal Representative

2:55 Ms. Seubert who is the surviving spouse?

2:56 Mr. Aherin not prepared to go into the issue of Personal Representative

2:58 Court suggests addressing Personal Representative another day

2:59 Mr. Creason will submit an Order for Personal Representative

3:04 Court grants Motion to Dismiss CV2012-277

Will allow Personal Representative to file claim within 20 days

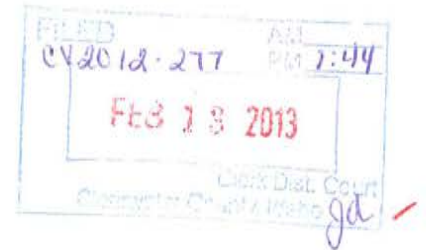
Will provide a written decision

3:05 Discussion addressing Mediation? Clarifying who all the Parties are going forward?

CV2012-439 - to Continue

3:09 Recess

Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell



**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

)  
) Case No. CV 2012-00277  
)

THE REVOCABLE FAMILY TRUST  
OF MICHAEL S. CORNELL AND  
ARLIE M. CORNELL.

)  
) **NOTICE OF SERVICE**  
)  
)  
)

NOTICE IS HEREBY GIVEN pursuant to Idaho Rules of Civil Procedure 33 and 34 that on the 22<sup>nd</sup> day of March, 2013, the Petitioner, Kareen Cornell, by and through her attorney of record, Theodore O. Creason, served by messenger one (1) copy of Petitioner, Personal Representative of the Estate Of John Cornell, Kareen Cornell's First Set of Interrogatories and First Set of Requests For Production and Requests For Admission Propounded To Respondent, Karin Seubert, attorney for Respondent, Toni C. Johnson.

DATED this 12<sup>th</sup> day of February, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

Theodore O. Creason, ISB #1563  
Attorney for Petitioner, Kareen Cornell

NOTICE OF SERVICE PURSUANT TO  
I.R.C.P. 33 AND 34 - 1


Theodore O. Creason  
Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston ID 83501  
(208)743-1516; Fax(208)746-2231

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of February, 2013, a copy of the foregoing NOTICE OF SERVICE PURSUANT TO I.R.C.P. 33 AND 34 was served by the method indicated below, and addressed to the following:

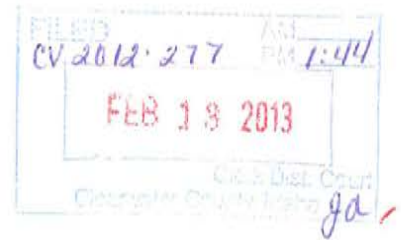
Karin Seubert  
Jones, Brower & Callery, PLLC  
1304 Idaho Street  
P. O. Box 854  
Lewiston, Idaho 83501

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☒ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ FAX TRANSMISSION

  
Theodore O. Creason, ISB #1563



Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
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Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell



**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:	)	Case No. CV 2012-00277
	)	
THE REVOCABLE FAMILY TRUST OF	)	NOTICE OF TAKING DEPOSITION
MICHAEL S. CORNELL AND ARLIE M.	)	OF TONI C. JOHNSON
CORNELL.	)	
	)	

**TO: RESPONDENT, TONI C. JOHNSON, TRUSTEE OF THE REVOCABLE  
FAMILY TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL,  
AND TO KARIN SEUBERT, HER ATTORNEY**

PLEASE TAKE NOTICE that the undersigned attorney for Kareen Cornell, Personal Representative of the Estate of John C. Cornell, will take the testimony, upon oral examination, of Toni C. Johnson before K&K Reporting, certified shorthand reporters of the State of Idaho, or in the case of their inability to act or be present, before some other person authorized to administer oaths, on Wednesday, March 22, 2013, at the hour of 9:00 a.m. of that day and thereafter from day to day as the taking of the deposition may be adjourned, at the offices of Creason, Moore, Dokken & Geidl, PLLC, 1219 Idaho Street, Lewiston, Idaho 83501.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 12<sup>th</sup> day of February, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Theodore O. Creason, ISB # 1563  
Attorneys for Kareen Cornell, Personal  
Representative of the Estate of John Henry Cornell

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of February, 2013, a copy of the foregoing NOTICE OF TAKING DEPOSITION OF TONI C. JOHNSON was served by the method indicated below and addressed to the following:

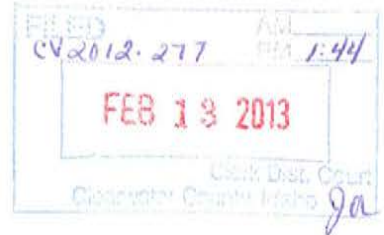
Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

Keith and Kristi Evans  
Certified Court Reporters  
P. O. Box 574  
Lewiston ID 83501

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, Idaho 83501



Theodore O. Creason, ISB #1563



Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
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Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

) Case No. CV 2012-00277  
)  
)

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

) **MOTION FOR SUBSTITUTION OF**  
) **PARTY (I.R.C.P. 25(a)(1))**  
)  
)

COMES NOW Kareen Cornell, Personal Representative of the Estate of John Henry Cornell, by and through her attorney of record, Theodore O. Creason of Creason, Moore, Dokken & Geidl, PLLC, and hereby moves this Court to approve substitution of the Estate of John Henry Cornell for John Henry Cornell. The Estate brings this motion pursuant to Idaho Rule of Civil Procedure 25(a)(1) and the order of this Court, dated February 6, 2013.

DATED this 12<sup>th</sup> day of February, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

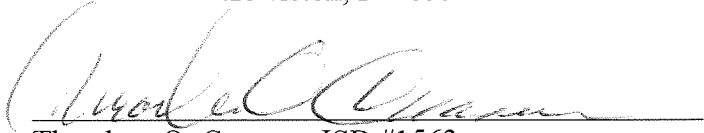
Theodore O. Creason, ISB #1563  
Attorneys for Personal Representative

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of February, 2013, I filed the foregoing MOTION FOR SUBSTITUTION OF PARTY with the Clerk of the Court, and provided a paper copy to the following persons:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

  
\_\_\_\_\_  
Theodore O. Creason, ISB #1563





Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
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Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

)  
) Case No. CV 2012-00277  
)

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.  
)  
)

**NOTICE OF HEARING**

Notice is hereby given that the undersigned will call on for hearing Petitioner's Motion for Substitution of Party (I.R.C.P. 25(a)(1)) on Tuesday, February 26, 2012, at 11:00 a.m., or as soon thereafter as counsel may be heard in the courtroom at the Clearwater County Courthouse, Orofino, Idaho.

DATED this 12<sup>th</sup> day of February, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

Theodore O. Creason, ISB # 1563  
Attorney for Petitioner Karen Cornell

NOTICE OF HEARING - 1

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston ID 83501  
(208)743-1516; Fax(208)746-2231

**CERTIFICATE OF MAILING**

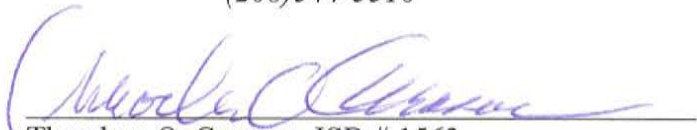
I HEREBY CERTIFY that on this 12<sup>th</sup> day of February, 2013, a copy of the foregoing NOTICE OF HEARING RE: PETITIONER'S MOTION FOR SUBSTITUTION OF PARTY (I.R.C.P. 25 (a)(1)) was served by the method indicated below and addressed to the following:

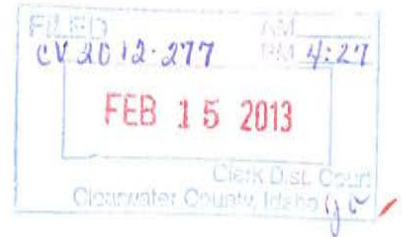
Karin Seubert  
Jones, Brower & Callery, PLLP  
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Lewiston, Idaho 83501

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\_X\_ HAND DELIVERED  
\_\_\_\_ OVERNIGHT MAIL  
\_\_\_\_ FAX TRANSMISSION  
(208)344-5510

  
\_\_\_\_\_  
Theodore O. Creason, ISB # 1563



IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

MEMORANDUM OPINION

On September 14, 2012, Karin Seubert representing Toni C. Johnson ("Toni") filed a Motion to Dismiss the Petition of John H. Cornell ("John") based upon abatement of John's claims following John's death. Darrell Aherin appeared on behalf of the deceased John Cornell. The parties have provided affidavits and briefs on the issue of abatement. Oral argument was originally set for November 27, 2012, but continued to January 8, 2013. Karin Seubert and Darrel Aherin submitted written memoranda and on January 8, 2013 presented oral argument.

After the hearing, Theodore Creason representing the widow of the deceased John Cornell, Kareen Cornell ("Kareen"), was permitted to file a memorandum and participate in another hearing. Kareen filed her Memorandum on January 18, 2013. On February 1, 2013, Toni filed a reply memorandum. Another hearing was conducted on

MEMORANDUM OPINION-1



February 6, 2013 on the Motion to Dismiss with Karin Seubert, Darrel Aherin, and Theodore Creason present and providing oral argument. The Motion, affidavits of the parties, the parties' memoranda, the oral argument of the parties and the file have been carefully considered.

### I. Statement of Facts

On November 1, 1996, Michael Cornell and Arlie Cornell, husband and wife, and parents to Toni and John, created a revocable family trust. The Trust provides "On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: Toni C. Johnson and John H. Cornell." Trust § 4.03.

On November 9, 2008, Arlie Cornell passed away. On August 6, 2009, Michael Cornell signed the First Amendment of the Cornell Trust which named Toni as sole trustee/successor trustee instead of Toni and John jointly serving in that capacity as provided for in the original Trust. On December 15, 2009, Michael Cornell, the last Trustor, passed away.

John was experiencing serious health and financial problems at the time his father passed away. John failed to obtain necessary medical care because of his lack of finances. John contacted his sister, Toni, regarding the status of the Trust following his father's death, but his sister refused to speak to him. John wrote several letters and made several phone calls to the attorney for the estate requesting information as to the status of the trust without a response from the attorney. In his third letter to the attorney dated September 17, 2010, John wrote, "Is it fair that Toni has a place to live and I do

not have a place to live. Why should I incur living expenses and she is in complete control of everything, living off the money in the trust and living free in my parent's house which is also my house?"

In the nearly two (2) years from the last trustor's death through John's death, Toni failed to distribute any part of the trust to John even while she lived rent free in the home that is included in the trust and apparently paid all her living expenses from trust funds. Toni has not distributed any of the funds from the trust other than for her own use.

John received \$3000 as the beneficiary of a life insurance policy on his father's life. Upon Toni's demand that he turn the money over to her, he sent a check for \$2500 to Toni and retained \$500 for living expenses.

On July 11, 2012 John filed a Petition for supervised administration and removal of trustee. The Petition alleges that Toni as trustee has "breached her fiduciary duty to settle and distribute The Trust in accordance with the terms of the Trust." Petition at § 11. The Petition also alleges that Toni mismanaged the estate by Toni paying her own personal expenses and paying the expenses associated with the real property on which she resided while failing to pay John his one-half share of the estate. Petition at § 10. Finally, the Petition alleges Toni failed to provide an inventory of the assets in the Trust. Petition at § 7.

On August 20, 2012, John committed suicide. In the case of death of one of the beneficiaries, the Trust provides at 4.03(a),

If any child, for whom a share of the Trust Estate has been set aside, should die prior to the above distribution, then the Trustee shall distribute all of such deceased child's share of the Trust Estate to his or her surviving issue in equal shares . . . If there is no surviving issue,, then all

of the deceased child's share of the Trust Estate shall be added to the shares set aside for the benefit of the Trustors' other living child ...."

John's wife, Kareen Cornell, survives him. However, John left no issue. Thus, the Trust Estate, in the absence of any distribution prior to John's death, will go in its entirety to Toni. Toni seeks to dismiss John's Petition on the basis that John's claims of mismanagement, breach of trust, and breach of fiduciary duty are abated by John's death.

## II. Legal Analysis

### A. Standard.

Affidavits have been filed and considered. In considering matters outside the pleadings on a motion to dismiss, such motion must be treated as a motion for summary judgment. I.R.C.P. 56(c); *Hellickson v Jenkins*, 118 Idaho 273, 276, 769 P.2d 150, 153 (Ct. App. 1990).

The standard for granting a motion for summary judgment has been often repeated by the appellate courts.

All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991).

*Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529, 887 P.2d 1034, 1036 (1994).

With respect to the abatement issue presented by Toni's Motion to Dismiss, there is no genuine issue of any material fact with respect to John's claims. I find it appropriate to consider Toni's motion for summary judgment. Toni's Motion for

Summary Judgment raises two issues: (1) Do John's claims survive his death under the common law? (2) If not, has the Idaho legislature abrogated the common law and provided for the survivability of John's claims?

B. John's claims do not survive his death under common law.

The Supreme Court recently considered in *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012) when the claims of deceased individuals are abated or terminated.

The abatement rule holds that in the absence of a legislative enactment addressing the survivability of a claim, the common law rules govern. See I.C. § 73–116 ("The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state."); see also *Evans v. Twin Falls Cnty.*, 118 Idaho 210, 215, 796 P.2d 87, 92 (1990). Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate. See *Helgeson v. Powell*, 54 Idaho 667, 674–79, 34 P.2d 957, 960–61 (1934); *Kloepfer v. Forch*, 32 Idaho 415, 417–18, 184 P. 477, 477 (1919).

*Id.* at 619-620.

Thus, in order for John's claims to survive his death, his claims must sound in contract, and not in tort. The *Bishop* decision is instructive as to how to analyze whether a case sounds in contract or tort for purposes of abatement of the claim. The *Bishop* case involved a legal malpractice claim. Although the malpractice claim arose out of a contractual claim to perform legal services, the Supreme Court held the claim to sound in tort for purposes of abatement.

As this Court previously recognized, "[l]egal malpractice actions are an amalgam of tort and contract theories." See *Johnson v. Jones*, 103 Idaho 702, 706, 652 P.2d 650, 654 (1982). The tort basis of legal malpractice actions flows from the elements of legal malpractice: "(a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damage to the client...." *Id.* (quoting *Sherry v. Diercks*, 29 Wash.App. 433, 437, 628 P.2d 1336, 1338

(1981)). "The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained." *Johnson*, 103 Idaho at 704, 652 P.2d at 652; *Fuller*, 119 Idaho at 425, 807 P.2d at 643 (holding that the tort of legal malpractice is also a breach of the attorney-client relationship). Breach of an attorney's duty in negligence is a tort. See *Harrigfeld v. Hancock*, 140 Idaho 134, 136, 90 P.3d 884, 886 (2004); *Johnson*, 103 Idaho at 704, 706–07, 652 P.2d at 652, 654–55. The contract basis of legal malpractice actions is the failure to perform obligations directly specified in the written contract. See *Johnson*, 103 Idaho at 704, 706–07, 652 P.2d at 652, 654–55 (holding that a breach of contract claim would arise if the attorney did not do what he promised to do in the contract, e.g., failing to draw up a contract of sale). Thus, under the abatement rule, breach of duty is an action in tort, not contract; that is, unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney. Breach of that duty is a tort.

*Id.* at 620.

The Idaho Supreme Court's analysis of whether legal malpractice claims are abated is very clearly applicable to this case. This case is a mixed tort and contract case. This case also involves torts arising from a contractual agreement. A tort basis for John's claims against Toni exists just as they were found to exist with respect to the legal malpractice claim in *Bishop*: (a) The existence of a fiduciary relationship is established by Toni being appointed as and acting as a trustee (b) the existence of a duty on the part of Toni, the trustee; (c) the alleged failure to meet that duty; (d) the failure of Toni to perform her duty was the proximate cause of John not receiving his share of the trust during his lifetime.

John relies on the directive of Trust § 4.03 that the trust be divided as soon as reasonably possible to argue that he states a contract claim which cannot be abated. The Supreme Court in *Bishop* considered a similar claim. The deceased client's estate

argued that the attorney-client relationship provided by contract that the attorney provide services and therefore exempted the claims of the estate from abatement. The Court held that

the contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct. If an attorney and client want to provide for a higher standard of care, they may do so by express language in the contract. Here, the standard of care in the contract is essentially the same as in any attorney-client relationship. Because this claim sounds in tort, it abated upon Patricia Shelton's death.

*Bishop v. Owens*, 152 Idaho 616, 620, 272 P.3d 1247, 1251 (2012).

Similarly, in this case, the contours of the duties owed by the trustee to the beneficiary are defined by sources outside the contract: Chapter 7 of the Uniform Probate Act, Idaho Code § 15-7-101 et seq., and the Uniform Principal and Trust Act at Idaho Code § 68-10-101 et seq. As exhaustively described in John's Memorandum at 2-6, Toni has allegedly violated her fiduciary duties as defined by Idaho Code §§ 15-7-302, 15-7-703, 68-10-103, 68-10-201 and 68-10-202. Violation of these fiduciary duties arising under statute is a tort.

The Trust provision upon which John relies that the assets be distributed as reasonably soon as possible is essentially the same as any trust fiduciary relationship governed by the Idaho Code. Idaho Code § 15-7-301 provides, "Except as specifically provided, the general duty of the trustee to administer a trust *expeditiously* for the benefit of the beneficiaries is not altered by this code." (emphasis added). Thus, John's claim abates since a tort arising under Idaho Code § 15-7-301 covers John's claim

John also relies upon § 8.02 of the Trust which requires periodic accountings. This provision virtually replicates Idaho Code § 15-7-303(a) except that the statute requires that Toni provide notice to John of the trust within thirty (30) days of her



acceptance of her status as trustee, while the trust has no such provision. Again, the Trust provision imposes no greater duty than that which the Idaho statutes already impose upon trustees. Therefore, as in *Bishop*, John's claim sounds in tort and abates upon his death under the common law.

John relies upon *Cruzen v. Boise City*, 58 Idaho 406, 74 P.2d 1037 (1937) to argue that "a breach of trust is not based upon a statute but rather upon a contractual obligation resting on every trustee to fulfill and comply with terms of a trust." Response to Motion to Dismiss at 8. Toni counters that "'a claim for a breach of a fiduciary duty is a negligence action[.]' *Jones v. Kootenai County Title Ins. Co.*,<sup>1</sup> 125 Idaho 607, 614, 873 P.2d 861, 868 (Idaho 1994)." Reply Brief at 4. Both parties ignore the specific facts of the case they cite that prevent the principles the parties draw from being universally applied.

In *Cruzen*, while there were statutes governing the procedural ability of the Plaintiff to sue the city, there was no state law imposing a duty upon the City to pay the Plaintiff bondholder. Unlike *Bishop v. Owens*, 152 Idaho 616, 620, 272 P.3d 1247, 1251 (2012), therefore, there was no mixed question of tort and contract. In *Cruzen*, the only duties imposed upon the city were contractual.

In *Jones*, cited by Toni, the Supreme Court clearly limited its holding: "the breach of an assumed duty claim sounds in tort." *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 612, 873 P.2d 861, 866 (1994). *Jones* does not hold that all fiduciary breaches are to be treated as torts. This case does not involve an assumed duty.

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<sup>1</sup> While Kootenai County Title Ins. Co. is the first identified defendant, the title of the case is actually *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*.

However, *Jones* does support finding that this case involves a tort and not a contract action for purposes of abatement. The Court observed, “A contract may ... create a state of things which furnishes the occasion for a tort. If the relation of the plaintiff and the defendants is such that a duty to take due care arises therefrom irrespective of contract and the defendant is negligent, then the action is one of tort.” *Jones*, 125 Idaho at 612, 873 at 866. As stated above, the duties John asserts Toni breaches arise irrespective of contract. The duties are grounded in state law regardless of what the contract states.

Finally, John argues that Toni breached the Trust “when she encouraged Michael C. Cornell to execute the First Amendment to the Revocable Trust of Michael C. Cornell and Arlie M. Cornell on August 6, 2009, which changed Article Nine Section 9.01 to state that Toni C. Johnson and John Henry Cornell are no longer co-successor trustees.” Response to Motion at 8. There are several problems with John’s argument. First, there are no specific facts supporting the allegation that Toni encouraged the Amendment. Even if there were such facts, John does not argue nor provide any specific facts demonstrating undue influence or Michael Cornell’s incapacity to be present when Michael Cornell made the change. Mere encouragement does not provide a basis for rescinding the amendment.

Second, even if Toni could somehow be held responsible for the amendment to the trust, no facts are present showing that the change made by Michael Cornell was the proximate cause for the damages John alleges he suffered because of Toni’s wrongful acts. Review of the checks submitted by John discloses that Toni was a joint signatory to the checking account and did not write checks in the capacity of a trustee.

John does not point to any specific action taken by Toni with regards to the property that she could not have accomplished even if John had remained a cotrustee. The Amendment of the Trust by itself did not cause the harm for which John seeks relief. John has failed to show a single instance in which Toni acted in her capacity as a Trustee, as opposed to her individual capacity as a joint account holder, to John's detriment.

Third, the Amendment took place on August 6, 2009, prior to the amendment of Idaho Code § 6-327 permitting the survival of wrongful actions as John alleges here. Therefore, John's claim cannot survive his death.

Fourth, the Uniform Principal and Income Act incorporates the provisions of the trust as part of the fiduciary duties of the Trustee. Idaho Code § 68-10-103(a)((1) states that a fiduciary as part of the fiduciary duties "shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this chapter." Thus, by rendering any violation of the trust a violation of a fiduciary duty imposed by statute, the legislature within the meaning of *Bishop* created a tort of any violation of the Trust and thus abatable upon death.

Finally, if John's argument is correct that the trust forbade the amendment of the trust, the Amendment was then ineffective. John could have exercised his powers of a cotrustee and not suffered any harm that he alleges occurred.

John's claims abate under common law. The alleged wrongful acts of Toni are all breaches of fiduciary duties under state law that for purposes of abatement are in the nature of torts. In the absence of any state law supplanting the common law, John's claims are abated and must be dismissed.

John argues that such fine parsing of the law is inconsistent with the equities of this case that cry for action against Toni's wrongdoing in failing to distribute to John during his lifetime his one-half share of the trust. This court cannot ignore the legislature or the Idaho Supreme Court's interpretations, regardless of the perceived injustice. Nor is it even clear that the Trustors would have desired the result urged by John. The Trustors could have provided in the trust for John's heirs as John now seeks as relief, but chose not to, instead limiting distribution of the trust solely to the issue of the deceased.

Kareen relies upon *Barnes v. Barnes*, 135 Idaho 103, 15 P.3d 816 (2000) to argue that any action regarding property survives abatement. The Supreme Court in *Barnes* held that once a divorce is granted, the associated issues of property and debt distribution survive the parties. Unlike the later *Bishop* decision, *Barnes* does not involve a mixed question of tort and contract.

Kareen also relies upon Am Jur cites for the principles that any tort to property survives the death of a party and an action pursuant to a remedial statute, as in this case, survives the death of the party. Memorandum Re: Respondent's Motion to Dismiss at 9. While Kareen correctly sets forth these principles, she provides no explanation as to how they are consistent with *Bishop*. The Supreme Court in *Bishop* did not distinguish torts done to persons or to property in determining whether the action survived the death of the party. Nor did the Supreme Court analyze whether the rules of professional conduct are remedial in nature for purposes of surviving the party's death. Therefore, Kareen's argument is rejected.

Kareen argues that Toni's Motion to Dismiss is premised upon the entirety of the trust vesting in her. Kareen makes four (4) arguments not made by John which she asserts undermines Toni's premise and which therefore must be considered before summary judgment can be considered. Memorandum Re: Respondent's Motion to Dismiss at 7. Kareen argues that these additional issues must be briefed and considered including "(1) whether distribution can serve as the proper event for vesting; (2) if so, whether the law presumes vesting within a reasonable period of time regardless of actual distribution; (3) whether the terms of vesting in the Trust violate the common law or statutory rule against perpetuities as to both Johnson's and John's interest; and (4) whether Johnson's conduct resulted in her holding that portion of the Trust res due to John in a constructive trust for the benefit of John and his heirs." *Id.*

First, the merits of who takes from the trust are irrelevant to whether John's claims survive his death. Kareen fails to point to how the issue is relevant to consideration of Toni's Motion for Summary Judgment.

Second, the issues are not articulated in John's Petition and therefore cannot be considered. Nowhere in John's Petition does he challenge the trust on the basis that the trust is ineffective under either common law, the rule of perpetuities or its provision for vesting upon distribution. Nor is there any challenge to the trust based upon a presumption under the law that presumes vesting within a reasonable period of time regardless of distribution.

Third, Kareen states that the arguments require further legal briefing, but then provides no legal argument to support her theories. Kareen's arguments cannot therefore be considered.

Fourth, Kareen argues that the issue of a constructive trust requires establishment of improper conduct which is a triable issue of fact. However, Kareen points to no additional facts to those already provided in the Affidavit of Margaret Wilkins which Kareen relies upon to argue her right to a constructive trust. Memorandum Re: Respondent's Motion to Dismiss at 9. In addition, under the *Bishop* analysis, the arguments regarding a constructive trust speak to wrongdoing, a tort, and one that is already subsumed under the Uniform Probate Act and the Uniform Principal and Trust Act. The constructive trust argument is indistinguishable from John's arguments regarding Toni's breaches of fiduciary duties.

Kareen in her Memorandum and orally at the hearing requested an opportunity to present her arguments if she is appointed personal representative of John's estate. Kareen was appointed personal representative of John's estate on February 6, 2013, the same date as the final argument in this case on the Motion to Dismiss. Kareen shall be given twenty (20) days to substitute for John and present issues free of the pleadings filed by John's attorney during John's lifetime.

B. The Idaho state legislature has not abrogated the common law and provided for the survivability of John's claims.

On July 1, 2010, the legislature abrogated the common law regarding abatement of certain civil actions while limiting relief in the form of damages that can be obtained. Idaho Code § 5-237(2) provides:

A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and



(iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence. Such action shall be commenced or, if already commenced at the time of the death of the injured person, shall be thereafter prosecuted by the personal representative of the estate of the deceased person or, if there be no personal representative appointed, then by those persons who would be entitled to succeed to the property of the deceased person according to the provisions of section 5-311(2)(a), Idaho Code.

The Idaho Supreme Court has made clear that Idaho Code § 5-327 cannot be applied retroactively. *Bishop v. Owens*, 152 Idaho at 1052. Thus, the issue presents itself as to whether Idaho Code § 5-327 permits consideration of John's claims after July 1, 2010, the effective date of the statute.

John makes several claims that are abated since they do not present any claim for damages. These include the allegations of the alleged "breach of fiduciary duty by the respondent [Toni] for failing to provide an inventory of the trust assets when a reasonable request was made by a beneficiary as required by Idaho Code Section 15-7-303." Response to Motion to Dismiss at 2; the alleged breach of the trust when Toni allegedly encouraged Michael C. Cornell to change the trust on August 6, 2009<sup>2</sup>. Response to Motion to Dismiss at 8-9 ; and the failure to provide accountings. Response to Motion to Dismiss at 9-10.

Idaho Code § 5-327(2) broadly allows for "a cause of action for "personal injury or property damage caused by the wrongful act . . ." Toni argues that the tort of breach of fiduciary duty in this case is not a personal injury action nor involving property damage and therefore not subject to Idaho Code § 5-327. Toni relies on the limited definition of property damage given at Idaho Code § 6-1601(8) which defines property

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<sup>2</sup> As this alleged wrongdoing by Toni took place in 2009, prior to the adoption of Idaho Code § 5-327(2) in 2010, John's claim rising in tort would be abated under the common law in any event.

damage as “loss in value or in use of real or personal property where such loss arises from physical damage or destruction of the property.”

I find the circumstances of this case to constitute property damage within the meaning of Idaho Code § 5-327(2). The damages alleged in this case arise from property being made unavailable by being retained by Toni and by Toni’s expenditures on her personal needs instead of being distributed to John as required under the trust. The unavailability of the funds has resulted in loss of use of the property within the meaning of Idaho Code § 6-1601.

In any event, the definition of property damage at Idaho Code § 6-1601 is too restrictive. While Idaho Code § 6-1601 limits property damage to losses that arise from physical damage or destruction of property, Idaho Code § 5-327(2) refers to property damage caused by a wrongful act. Certainly, the misappropriation of funds resulting in deprivation of property to which John is entitled constitutes damage to his right to property caused by a wrongful act.

It is not enough to find that Idaho Code 5-327(2) abrogates the common law with regards to John’s tort claims against Toni. John’s action may only proceed if the relief sought is one of the three types of damages specifically listed at Idaho Code § 5-327(2). John does not seek lost wages or medical expenses which are two of the three types of damages which can be obtained. Thus, the issue is joined as to whether Toni’s alleged misappropriation of the trust by using the trust proceeds on herself and Toni’s failure to distribute John’s share of the trust to him are “out of pocket expenses incurred.” Idaho Code § 5-327(2)(ii).

John argues that the term, “out of pocket expenses actually incurred”, encompasses the value of John’s share of the trust that was not distributed to him and the amounts that Toni misappropriated for herself. Thus, John argues “out of pocket expenses” should be defined as including property wrongfully taken and withheld as allegedly occurred in this case.

However, the Idaho state legislature has already indicated in the Crime Victims Compensation Act that the definition of out of pocket expenses excludes property wrongfully taken.

Under I.C. § 19–5304(2), the trial court may order restitution for any economic loss that the victim actually suffers. The statute gives a broad definition of economic loss:

“Economic loss” *includes, but is not limited to*, the value of property taken, destroyed, broken, or otherwise harmed, lost wages, and direct out-of-pocket losses or expenses, such as medical expenses resulting from the criminal conduct, but does not include less tangible damage such as pain and suffering, wrongful death, or emotional distress.

I.C. § 19–5304(1)(a) (emphasis added).

*State v. Olpin*, 140 Idaho 377, 379, 93 P.3d 708, 710 (Ct. App. 2004).

Idaho Code § 19–5304(1)(a)(ii) separately identifies “direct out of pocket losses or expenses such as medical expenses” and “the value of property taken, destroyed, broken or otherwise harmed.” John seeks compensation for the value of property taken from him by Toni’s wrongful acts in failing to give John his share of the estate and misappropriating property of John for her own benefit. The state legislature knew how to express language that would cover John’s type of losses. Instead, the state legislature chose not to do so at Idaho Code § 5-327(2) by limiting damages to direct out of pocket expenses and not adding property taken as a form of damages that is not

abated. John did not incur any out of pocket expenses within the meaning of the statute and so his claims are abated.

The Crime Victim's Compensation Act is also significant for its broad definition of the type of expenses that can be reimbursed under the Act. The Act provides that the definition of economic loss reimbursable "includes, but is not limited to" a broad list of forms of loss. Idaho Code § 19-5304(1). Thus, the Idaho Court of Appeals in *Olpin*, in light of the broad purposes and liberal definitions underlying the Victims Compensation Act, had no problem in analogizing to "lost wages" to find that the costs associated with employees researching the losses incurred by the business and the cost of testifying in court to be reimbursable economic costs.

In contrast, Idaho Code § 5-327(2) by its express limitation does not permit analogizing or stretching the definitions to cover costs that do not come within the strict definitions. Damages are "expressly limited" to three types of damages.

The damages John seeks- recovery of property wrongfully withheld from him- do not meet the definition of out of pocket expenses. Therefore, Idaho Code § 5-327(2) does not overrule the common law abatement of John's causes of action.

John makes no claim against Toni and the administration of the estate of their parents that survives his death under the common law or under Idaho Code § 5-327. Under the terms of the trust, John's heirs have no claim against the estate as he left no surviving issue. Trust § 4.03(a).

### III. CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, and there being no material facts in dispute, the Motion to Dismiss filed by Toni C. Johnson of the

Petition for Supervised Administration and Removal of Trustee, converted into a Motion for Summary Judgment by the filing of Affidavits, shall be granted and the Petition for Supervised Administration and Removal of Trustee will be dismissed as John's claims set forth in his Petition do not survive his death under common law, state law or the trust. Kareen, as the newly personal representative of John's estate, shall be given twenty (20) days to file claims on behalf of the estate in the above entitled case.

Dated this 15<sup>th</sup> day of February, 2013.

  
Randall W Robinson, Magistrate

#### CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Memorandum Opinion was mailed postage pre-paid, on the 15<sup>th</sup> day of February, 2013, to:

Darrel Aherin  
Aherin, Rice & Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By:   
Deputy Clerk



IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

FILED  
CV 2012-277  
FEB 15 2013  
4:27  
Clerk Dist. Court  
Clearwater County Idaho  
ja

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277


JUDGMENT FOR DISMISSAL

Based upon Findings of Fact and Conclusions of Law as set forth in the Memorandum Opinion filed in this case on February 15, 2013, and good cause appearing thereby, IT IS HEREBY ORDERED

That the Motion to Dismiss filed by Toni C. Johnson of the Petition for Supervised Administration and Removal of Trustee, converted into a Motion for Summary Judgment by the filing of Affidavits, IS HEREBY GRANTED and the Petition for Supervised Administration and Removal of Trustee is HEREBY DISMISSED.

Kareen Cornell, the personal representative for John Cornell's estate shall be given twenty (20) days to set forth in the above entitled action the claims of the estate.

Dated this 15th day of February, 2013.

  
Randall W Robinson, Magistrate

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Judgment of Dismissal was mailed postage pre-paid, on the 15<sup>th</sup> day of February, 2013, to:

Darrel Aherin  
Aherin, Rice & Anegon  
P.O. Drawer 698  
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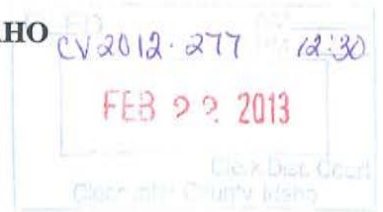
CARRIE BIRD  
Clerk of the District Court

By: [Signature]  
Deputy Clerk





SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544



In The Matter Of

Michael S. Cornell, etal.

)  
)  
)  
)  
)

Case No: CV-2012-0000277

**NOTICE OF HEARING**

**NOTICE IS HEREBY GIVEN** that the above-entitled case is hereby set for:

**Motion**

Judge:

Courtroom:

**Tuesday, February 26, 2013**

Randall W. Robinson

Magistrate Courtroom

**11:00 AM**

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on February 22nd, 2013.

DARREL W. AHERIN  
P.O. BOX 698 1212 IDAHO ST.  
LEWISTON ID 83501-0698

KARIN SEUBERT  
P.O. BOX 854  
LEWISTON ID 83501

THEODORE O. CREASON  
P.O. DRAWER 835  
LEWISTON ID 83501

Dated: February 22nd, 2013  
Carrie Bird  
Clerk Of The District Court

By: \_\_\_\_\_

*Jodi Allain*  
Deputy Clerk

DOC22cv 7/96

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

COURT MINUTES

CV-2012-0000277

The Matter of Michael S Cornell

CV2012-0000439

The Matter of the Estate of John Henry Cornell

Hearing type: Motion for Consolidation

Hearing date: 02/26/2013

Time: 11:12 am

Judge: Randall W. Robinson

Courtroom: 001

Court reporter: None

Minutes Clerk: Jodie

Tape Number: CD552-1

11:12 The Honorable Randall W. Robinson presiding. Present in Court:

Ted Creason, Sam Creason; Karin Seubert; Telephonically – Darrel Aherin

11:13 Court addressing Mr Aherin's concerns

11:14 Mr Aherin objects John Cornell not a resident of Idaho; was living in Nevada

11:15 Mr Creason – John was living in Nevada for several months due to health &  
finance issues

Clarifies domicile vs residing

11:17 Legal issue is Domicile? Personal Representative? Or Will?

11:19 Mr Aherin – discussion about jurisdiction of this Will/Trust being property is in Clearwater County

11:21 Court – regarding the issue of Appointing Personal Representative  
Mr Creason had offered to have client appear in person but did not request for today's attendance

11:22 Court Trust/Estate located here in Idaho – Court does have jurisdiction

11:24 Court clarifying jurisdiction and Amending his Order

11:25 Ms Seubert – discussion and clear record to confirm that ALL parties agree that John Cornell was domiciled in Idaho at time of death

11:27 Court – jurisdiction?

11:30 Mr Creason clarifies Domicile issue – IDAHO and verified Petition

11:31 Mr Aherin Probate property because Court has jurisdiction being the land is in Clearwater County

11:32 Ms Seubert – clarifies this is a TRUST Issue!

11:32 Parties in agreement

11:35 Discussion continues regarding Jurisdiction and the Trust

11:44 Court – will sign Order?

11:51 Mr Creason – New allegations

11:52 Ms Seubert has new pleadings that will file today, 02/26/13

11:53 Mr Creason requests time to explain merits of this case

11:54 All Parties - discussion

12:00 Ms Seubert asks to have issues resolved now or at a later time?

12:01 Court – wants more time to review all the information

12:03 Date set for next hearing: March 13, 2013 at 3:00 PM

12:04 Recess

Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Petitioner/Personal Representative  
Of Estate of John Henry Cornell



**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

)  
) Case No. CV 2012-00277  
)

) **MOTION FOR CONSOLIDATION**  
) **(I.R.C.P. 42(a))**  
)  
)

COMES NOW Kareen Cornell, Petitioner in this matter and Personal Representative of the Estate of John Henry Cornell, by and through her attorney of record, Theodore O. Creason of Creason, Moore, Dokken & Geidl, PLLC, and hereby moves this Court to order consolidation of this action with Case No. CV 2012-439, *In the Matter of The Estate of John H. Cornell* pursuant to the Court's powers under Idaho Rule of Civil Procedure 42(a).

Petitioner brings this motion upon the grounds that consolidation would expedite the Court's business and further the interests of the litigants. *See Branom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502, 509, 365 P.2d 958, 961 (1961).

DATED this 26th day of February, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Theodore O. Creason, ISB #1563

Attorneys for Petitioner/Personal Representative

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 26th day of February, 2013, I filed the foregoing PETITION FOR SUPERVISED ADMINISTRATION AND COURT ORDERED DISTRIBUTION with the Clerk of the Court, and **hand-delivered a paper copy** to the following persons:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501

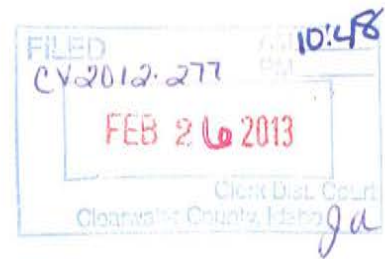
Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501



Theodore O. Creason, ISB #1563



Theodore O. Creason, ISB #1563  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorney for Kareen Cornell, Surviving  
Spouse Of John Henry Cornell



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

) CV 2012-277

) PETITION BY KAREEN CORNELL AS  
) PERSONAL REPRESENTATIVE OF THE  
) ESTATE OF JOHN HENRY CORNELL AND  
) AS SURVIVING SPOUSE OF JOHN HENRY  
) CORNELL, DECEASED BENEFICIARY OF  
) THE REVOCABLE FAMILY TRUST OF  
) MICHAEL S. CORNELL AND ARLIE M.  
) CORNELL FOR SUPERVISED  
) ADMINISTRATION AND COURT  
) ORDERED DISTRIBUTION

COMES NOW Kareen Cornell, in her capacity as personal representative of the estate of the Estate of John Henry Cornell and as surviving spouse of John Henry Cornell (hereinafter "Petitioner") by and through her attorney of record, Theodore O. Creason of Creason, Moore, Dokken & Geidl, PLLC, and hereby alleges as follows:

## **I. PARTIES**

1.1. Petitioner brings this action on behalf of the Estate of John Henry Cornell (hereinafter "Estate"). The Estate has been admitted into formal probate before this Court in Case No. CV 2012-439.

1.2. The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell (hereafter "the Trust") was formed and has been administered in the State of Idaho. The acting successor trustee of the Trust is Toni Johnson (née Cornell).

## **II. JURISDICTION & VENUE**

2.1. This Court has jurisdiction over this matter and the parties thereto pursuant to the Idaho Trust and Estate Dispute Resolution Act, Idaho Code §§ 15-8-101 through 15-8-305.

2.2. This Court is the proper venue for administration of the Trust pursuant to Idaho Code § 15-7-202.

2.3. This case was instituted on July 11, 2012. Since that time, the Trust has not asserted lack of personal jurisdiction or requested a change of venue.

## **III. FACTS**

3.1. Michael S. Cornell and Arlie M. Cornell created the Trust on November 1, 1996, a copy of the Trust document is attached hereto as Exhibit A.

3.2. John Cornell was a beneficiary of the Trust.

3.3. As a beneficiary of the Trust, John Cornell held an equitable property interest in the property of the Trust.

3.4. Arlie M. Cornell died on November 9, 2008.

3.5. On August 6, 2009, Michael S. Cornell amended the terms of the Trust from having John Cornell and Toni Johnson serve as co-trustees of the Trust upon his death, to



designating Toni Johnson as the sole successor trustee upon his death, a copy of the amendment is attached hereto as Exhibit B.

3.6. Michael S. Cornell died on December 15, 2009.

3.7. Toni Johnson (hereinafter, "Successor Trustee") has been serving as sole successor trustee since the death of Michael S. Cornell.

3.8. On or about January 3, 2007, John Henry Cornell deposited by quitclaim, separate property into the Trust in the form of Lot 34, Lakeview First Addition, real property adjacent to real property owned by his parents, Michael S. and Arlie M. Cornell, into the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell.

3.9. John Cornell instituted this action on July 11, 2012 by filing a Petition for Supervised Administration and Removal of Successor Trustee.

3.10. John Cornell died on August 20, 2012.

3.11. On February 15, 2013, this Court dismissed all claims raised by John Cornell, personally, and granted the Estate twenty (20) days in which to raise the claims of the Estate in this matter.

3.12. Under the terms of the Trust, the Trust assets were to be distributed equally to John Cornell and Toni Johnson upon the death of Michael S. and Arlie M. Cornell.

3.13. Successor Trustee has not made reasonable efforts to distribute the Trust in a timely manner, in contravention of her fiduciary duties and statutory duties under Idaho Code §§ 15-7-301, 15-7-302 & 15-7-305.

3.14. Despite demands, Successor Trustee has not provided records or any accounting of her management of the Trust, in contravention of her fiduciary duties and statutory duties under Idaho Code §§ 15-7-302 & 15-7-303.

3.15. Successor Trustee has not created an inventory of the assets in the Trust at any time during her service as Successor Trustee of the Trust, in contravention of her fiduciary duties and statutory duties under Idaho Code §§ 15-7-302 & 15-7-303.

3.16. Successor Trustee has not kept John Cornell or Petitioner reasonably informed of the status of the Trust, in contravention of her fiduciary duties and statutory duties under Idaho Code §§ 15-7-302 & 15-7-303.

3.17. Successor Trustee has mismanaged the Trust through negligent and inequitable conduct, in contravention of her fiduciary duties and statutory duties under Idaho Code §§ 15-7-301 & 15-7-302.

3.18. Successor Trustee has resided and otherwise occupied and used the real property belonging to the Trust without accounting to the Trust or paying rent during her tenancy at the property, in contravention of her contractual, fiduciary and statutory duties and under Idaho Code §§ 15-7-301 & 15-7-302.

3.19. Successor Trustee has used assets of the Trust to pay personal expenses, in contravention of her contractual, fiduciary, and statutory duties under Idaho Code §§ 15-7-301 & 15-7-302.

3.20. As a result of losses suffered from the Successor Trustee's inequitable conduct, the Trust holds a creditor's claim against Successor Trustee.

3.21. As a result of losses suffered from the Successor Trustee's inequitable conduct, Petitioner holds a creditor's claim against Successor Trustee and the Trust.

3.21. Successor Trustee converted assets of the Trust into personal assets.

3.22. As a result of Successor Trustee's conversion, the Trust holds a creditor's claim against Successor Trustee until such time as restitution is made.

3.23. As a result of Successor Trustee's inequitable conduct, Successor Trustee holds assets, personally in constructive trust, for the Estate and/or the Trust.

#### **IV. LIABILITY**

4.1. Petitioner realleges paragraphs 1-3 above.

4.2. Upon accepting and undertaking her duties as successor trustee, Successor Trustee became party to a third-party beneficiary contract charged with the responsibility of carrying out the terms of the Trust in an equitable, reasonable and timely manner for the benefit of the third-party beneficiaries named and in compliance with the laws of the State of Idaho.

4.3. Upon accepting her duties as successor trustee, Successor Trustee agreed and undertook to hold assets in Trust for the benefit of the true owner(s). Successor Trustee's actions constitute breaches of Successor Trustee's fiduciary duties (1) of loyalty toward all beneficiaries; (2) to act in good faith while administering the Trust; (3) to keep clear and accurate accounts and adequate records of transactions; (4) to keep beneficiaries informed of all material facts that might affect their rights under the Trust; (5) to provide beneficiaries an accounting of the Trust; (6) to not engage in self-dealing; (7) to properly care for assets of the Trust, including its financial records, and (8) to conform administration to the terms of the Trust.

4.4. The Trust is entitled to damages pursuant to an action in claim and delivery under the common law action for conversion and equitable actions of detinue or replevin.

4.5. Successor Trustee's actions constitute inequitable conduct giving rise to a constructive trust for all assets (a) obtained by Successor Trustee, personally, through the inequitable conduct; or (b) diminished from another's interest by the Successor Trustee.

4.6. The Trust, on behalf of the beneficiaries, is entitled to damages pursuant to an action for unjust enrichment.

4.7. The Trust, on behalf of the beneficiaries, is entitled to an accounting and to enforce the contractual provisions of the Trust instrument in favor of the beneficiaries.

4.8. The Trust is entitled to relief pursuant to all other causes of action in law or equity supported by the facts as set forth herein.

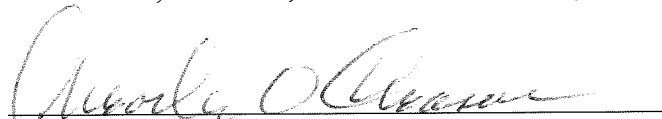
### **PRAYER FOR RELIEF**

WHEREFORE, Petitioner requests that:

1. Successor Trustee be ordered to file an inventory of Trust assets and accounting of management of those assets during her tenure as successor trustee of the Trust.
2. Successor Trustee be ordered to make restitution to the Trust for damages caused by Successor Trustee's wrongful conduct.
3. Upon approval of the inventory and accounting by the Court, Successor Trustee be ordered to file a proposed distribution of the Trust assets.
4. Upon approval of the proposed distribution by the Court, Successor Trustee be ordered to distribute the property by a time certain, as set forth by the Court.
5. The Court order legal fees and costs incurred by Petitioner be paid by Toni C. Johnson, personally, or from Toni C. Johnson's share of The Trust assets.
6. For such other and further relief as the Court deems just and proper.

DATED this 26th day of February, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Theodore O. Creason, ISB #1563

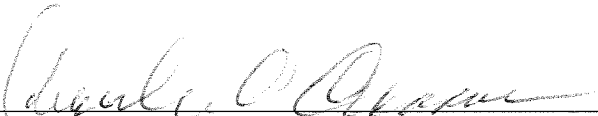
Attorneys for Petitioner, Kareen Cornell

**CERTIFICATE OF SERVICE**

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Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

  
\_\_\_\_\_  
Theodore O. Creason, ISB #1563

## MEMORANDUM OF TRUST

THIS AGREEMENT made this 1st day of Nov, 1996,  
by and between MICHAEL S. CORNELL and ARLIE M. CORNELL, as  
Trustors and Trustees.

WITNESSETH THAT:

1. Contemporaneously herewith Trustors and Trustees have entered into a Revocable Living Trust known as  
the "MICHAEL S. CORNELL AND ARLIE M. CORNELL REVOCABLE TRUST dated  
11-1-96."
2. This Memorandum of Trust is executed as evidence of the existence of the MICHAEL S. CORNELL AND ARLIE M. CORNELL REVOCABLE TRUST, the terms and conditions of which are hereby incorporated herein by this reference.
3. Said Trust Agreement grants to the Trustee all of the powers contained in West's Annotated California Probate Code Sections 16,200 et seq., all of which are incorporated herein by this reference. See Exhibit "A" attached hereto.
4. Any person may rely on this Memorandum of Trust as proof of the existence of said Trust and is relieved of any obligation to verify that any transaction entered into by the Trustee is consistent with the terms and conditions of said Trust.
5. The Co-Successor Trustees are TONI C. JOHNSON and JOHN H. CORNELL.

IN WITNESS WHEREOF, the Trustors and the Trustees have signed this Memorandum of Trust the day and year first above written.

TRUSTORS/TRUSTEES

Michael S. Cornell  
MICHAEL S. CORNELL

Archie M. Cornell  
ARLIE M. CORNELL

STATE OF CALIFORNIA)

)SS

COUNTY OF Orange

ON 11-1-96, BEFORE ME, Hurd Thornton, PERSONALLY  
APPEARED MICHAEL S. CORNELL and ARLIE M. CORNELL PERSONALLY KNOWN TO  
ME OR X PROVED TO ME ON THE BASIS OF SATISFACTORY EVIDENCE TO BE THE  
PERSONS WHOSE NAMES ARE SUBSCRIBED TO THE WITHIN INSTRUMENT, AND ACKNOWLEDGE  
THAT THEY EXECUTED THE SAME IN THEIR AUTHORIZED CAPACITY, AND THAT BY THEIR  
SIGNATURES ON THE INSTRUMENT THE PERSONS, OR THE ENTITY UPON BEHALF OF WHICH  
THE PERSONS ACTED, EXECUTED THE INSTRUMENT.

WITNESS MY HAND AND OFFICIAL SEAL

NOTARY PUBLIC

Hurd Thornton

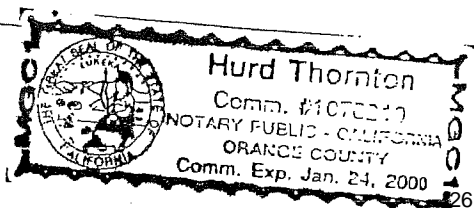


EXHIBIT "A" TO MEMORANDUM OF TRUST

SUMMARY OF TRUST POWERS

- A) SELL, CONVEY, EXCHANGE, CONVERT, IMPROVE, REPAIR, PARTITION, DIVIDE, ALLOT, SUBDIVIDE, CREATE RESTRICTIONS, EASEMENTS, OR OTHER SERVITUDE THEREON, OPERATE AND CONTROL;
- B) LEASE FOR TERMS WITHIN OR BEYOND THE TERM OF ANY TRUST PROVIDED FOR IN THIS DECLARATION AND FOR ANY PURPOSE, INCLUDING EXPLORATION FOR AND REMOVAL OF GAS, OIL AND OTHER MINERALS;
- C) ENCUMBER OR HYPOTHECATE FOR ANY TRUST PURPOSE BY MORTGAGE, DEED OF TRUST, PLEDGE OR OTHERWISE;
- D) CARRY INSURANCE OF SUCH KINDS AND IN SUCH AMOUNTS AT THE EXPENSE OF THE TRUSTS PROVIDED FOR IN THIS DECLARATION AS THE TRUSTEE MAY DEEM ADVISABLE;
- E) COMMENCE OR DEFEND AT THE EXPENSE OF ANY TRUST PROVIDED FOR IN THIS DECLARATION SUCH LITIGATION WITH RESPECT TO ANY SUCH TRUST OR ANY PROPERTY OF THE TRUST ESTATE AS TRUSTEE MAY DEEM ADVISABLE.
- F) SO LONG AS THE ORIGINAL TRUSTEE OR TRUSTEES ARE MANAGING THE TRUST, THEY MAY INVEST AND REINVEST IN COMMON OR PREFERRED STOCKS, SECURITIES, INVESTMENT TRUSTS, BONDS AND OTHER PROPERTY, REAL OR PERSONAL, FOREIGN OR DOMESTIC, INCLUDING ANY UNDIVIDED INTEREST IN ANY ONE OR MORE COMMON TRUST FUNDS, WHETHER OR NOT SUCH INVESTMENTS BE OF THE CHARACTER PERMISSIBLE FOR INVESTMENTS BY FIDUCIARIES UNDER ANY APPLICABLE LAW;
- G) VOTE, BY PROXY OR OTHERWISE, IN SUCH MANNER AS TRUSTEE MAY DETERMINE TO BE IN THE BEST INTERESTS OF THE TRUST;
- H) PAY ANY ASSESSMENTS OR OTHER CHARGES LEVIED ON ANY STOCK OR OTHER SECURITY HELD BY TRUSTEE PURSUANT TO THIS DECLARATION;
- I) EXERCISE OR EXERCISE AS TRUSTEE MAY DEEM BEST ANY SUBSCRIPTION, CONVERSION OR OTHER RIGHTS OR OPTIONS;
- J) PARTICIPATE IN ANY PLANS OR PROCEEDINGS FOR THE FORECLOSURE, REORGANIZATION, CONSOLIDATION, MERGER OR LIQUIDATION OF ANY CORPORATION OR ORGANIZATION THAT HAS ISSUED SECURITIES HELD BY THE TRUSTEE OR WILL ISSUE SECURITIES TO BE HELD BY TRUSTEE IN TRUST;
- K) ENFORCE ANY MORTGAGE OR DEED OF TRUST OR PLEDGE BY TRUSTEE IN TRUST;
- L) COMPROMISE, SUBMIT TO ARBITRATION, RELEASE WITH OR WITHOUT CONSIDERATION AND OTHERWISE ADJUST ANY CLAIMS;
- M) DISTRIBUTE GIFTS OF UP TO \$10,000 PER YEAR PER DONEE OUT OF PRINCIPAL OR INTEREST OR IN ANY PROPORTION OF THE TWO THAT THE TRUSTEE, IN HIS SOLE DISCRETION, DEEMS ADVISABLE;



- N) INVEST IN AND GUARANTEE A BUSINESS OR TRUSTEE OF THE TRUST CAPITALIZING ON THE BUSINESS VENTURE;
- O) TAKE ALL SUCH PROCEEDINGS, AND EXERCISE ALL SUCH RIGHTS AND PRIVILEGES AS COULD BE DONE, TAKEN OR EXERCISED BY AN ABSOLUTE OWNER OF THE TRUST PROPERTY;
- P) SO LONG AS BOTH OF THE ORIGINAL TRUSTEES ARE SERVING AS TRUSTEES HEREUNDER, EITHER OF THEM SHALL HAVE THE POWER TO BIND THE TRUST IN ANY AND ALL TRANSACTIONS, INCLUDING, BUT NOT LIMITED TO (1) COLLECTING RECEIPTS; (2) PAYING DISBURSEMENTS; (3) SECURING ASSETS; (4) WRITING CHECKS AND MAKING WITHDRAWALS FROM BANK ACCOUNTS; AND (5) PURCHASING, SELLING AND PLEDGING SECURITIES AND OTHER PROPERTY;
- Q) THE TRUSTEE IS EMPOWERED TO BUY, SELL, TRADE AND DEAL IN OPTIONS, PRECIOUS METALS, STOCKS, BONDS AND SECURITIES OF ALL MATURE (INCLUDING "SHORT" SALES AND SPECULATIVE OPTION TRANSACTIONS;
- R) HE SUCCESSOR TRUSTEE HAS THE AUTHORITY TO ENTER THE SAFE DEPOSIT BOX IN TRUSTORS' NAMES, INDIVIDUALLY OR AS TRUSTEES OF THE TRUST, AND REMOVE THE CONTENTS THEREOF;
- S) THE TRUSTEE SHALL HAVE THE POWER TO BORROW MONEY FOR ANY TRUST PURPOSE (INCLUDING FROM THE PROBATE ESTATE FOR THE PURPOSE OF PAYING TAXES) ON SUCH TERMS AND CONDITIONS AS THE TRUSTEE MAY DEEM PROPER FROM ANY PERSON, FIRM OR CORPORATION;
- T) THE TRUSTEE IS AUTHORIZED TO LOAN OR ADVANCE TRUSTEE'S OWN FUNDS TO ANY TRUST PROVIDED FOR IN THIS DECLARATION FOR ANY TRUST PURPOSE AND TO CHARGE FOR SUCH LOAN OR ADVANCE TO THE TRUST;
- U) THE TRUSTEE IS AUTHORIZED TO PURCHASE SECURITIES OR OTHER PROPERTY FROM AND TO MAKE LOANS AND ADVANCEMENTS FROM THE PROBATE ESTATE WITH OR WITHOUT SECURITY TO THE EXECUTOR OR OTHER REPRESENTATIVE OF THE ESTATE OF EITHER TRUSTOR; AND
- V) THE TRUSTEE MAY HOLD SECURITIES OR OTHER PROPERTY HELD BY TRUSTEE IN TRUST PURSUANT TO THIS DECLARATION IN TRUSTEE'S NAME AS TRUSTEE UNDER THIS DECLARATION, IN TRUSTEE'S OWN NAME WITHOUT A DESIGNATION SHOWING IT TO BE TRUSTEE UNDER THIS DECLARATION, IN THE NAME OF TRUSTEE'S NOMINEE, OR THE TRUSTEE MAY HOLD SUCH SECURITIES UNREGISTERED IN SUCH CONDITION THAT OWNERSHIP WILL PASS BY DELIVERY;
- W) THE TRUSTEE HAS THE AUTHORITY TO EXECUTE ANY POWER OF ATTORNEY FORM FOR ANY ACCOUNT HELD IN TRUSTORS' NAMES IN ANY BANK;

FIRST AMENDMENT TO  
THE REVOCABLE TRUST OF  
MICHAEL S. CORNELL AND ARLIE M. CORNELL

This First Amendment to THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL, dated this 6<sup>th</sup> day of August, 2009, is made by Michael S. Cornell, as Surviving Grantor and Surviving Trustee of THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL and accepted and consented to by MICHAEL S. CORNELL, acting in his capacity as Surviving Grantor and Surviving Trustee, on this 6<sup>th</sup> day of August, 2009.

By agreement with the Trustees dated November 1, 1996, Grantors, Michael S. Cornell and Arlie M. Cornell created and placed into effect THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL; Arlie M. Cornell has passed leaving Michael S. Cornell as Surviving Grantor and Surviving Trustee; and as Surviving Grantor the said Michael S. Cornell desires to amend said trust agreement, and the Surviving Trustee is willing to accept and consent to such amendment.

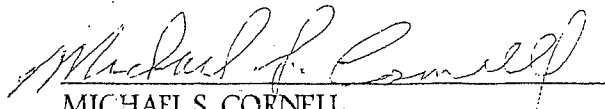
NOW, THEREFORE, Surviving Grantor and Surviving Trustee agree as follows:

Article Nine Section 9.01 Trustees SECOND of THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL shall be amended to read as follows:

SECOND: At the death or incapacity of the undersigned, TONI C. JOHNSON shall act as Trustee/Successor Trustee. In the event that TONI C. JOHNSON is unavailable or unwilling to act, then in that event, JOHN HENRY CORNELL shall act as Trustee/Successor Trustee.

All other terms and provisions of THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL shall remain in full force and effect.

DATED this 6<sup>th</sup> day of August, 2009.

  
MICHAEL S. CORNELL  
Surviving Grantor

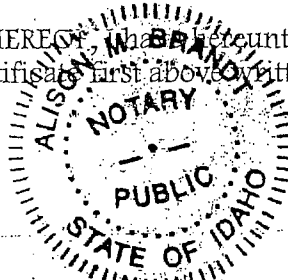
STATE OF IDAHO )

) ss.

County of Clearwater )

On this 6<sup>th</sup> day of August, 2009, before me, a notary public in and for the State of Idaho, personally appeared Michael S. Cornell, a single person, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Alison M. Brandt  
Notary Public in and for Idaho.  
Residing at: Orfina  
Commission Expires: 2-26-2010

ACCEPTED this 6<sup>th</sup> day of August, 2009.

Michael S. Cornell  
MICHAEL S. CORNELL  
Surviving Trustee

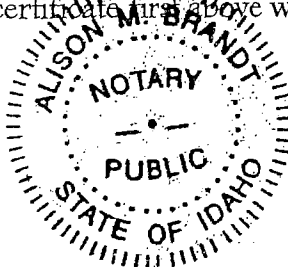
STATE OF IDAHO )

) ss.

County of Clearwater )

On this 6<sup>th</sup> day of August, 2009, before me, a notary public in and for the State of Idaho, personally appeared Michael S. Cornell, known or identified to me to be the person whose name is subscribed to the within instrument as Trustee for THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL, and acknowledged to me that he executed the same as such Trustee for THE REVOCABLE TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Alison M. Brandt  
Notary Public in and for Idaho.  
Residing at: Orfina  
Commission Expires: 2-26-2010

FIRST AMENDMENT TO THE REVOCABLE TRUST OF  
MICHAEL S. CORNELL AND ARLIE M. CORNELL  
Page 2 of 2

**Karin Seubert**  
**JONES, BROWER & CALLERY, P.L.L.C.**  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813

Case No. CV 2012-277  
 Filed 3/1/13  
 at 12:15 o'clock PM  
Carrie Bird  
 By [Signature] Clerk  
Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

Case No. CV 2012-00277

**MEMORANDUM OF COSTS AND  
 ATTORNEY FEES**

COMES NOW Karin Seubert of Jones, Brower and Callery, P.L.L.C., on behalf of the Respondent Toni Johnson, pursuant to Idaho Code Section 15-8-208 and Rule 54(d), 54(e)(1) and 54(e)(3) of the Idaho Rules of Civil Procedure, submit the following items of costs to which the Court may order to be awarded to Respondent Toni Johnson as follows:

Costs (filing fee) \$66.00

Reasonable attorney fees to be fixed by the Court as set out in the Affidavit for Attorney Fees filed herewith (specifically does not include costs related to probate of Estate of John Cornell or filings by Estate/Kareen Cornell after dismissal of original petition).

\$6,422.50

MEMORANDUM OF COSTS  
 AND ATTORNEY FEES

DATED this 1st day of March, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
KARIN SEUBERT

KARIN SEUBERT being first duly sworn and on oath, deposes and says:

That she is the attorney for Respondent Toni Johnson and as such is well informed as to the costs, disbursements and attorney fees of Toni Johnson; that to the best of her knowledge and belief, the items in the Memorandum of Costs and Attorney Fees are correct and that the said disbursements have been necessarily incurred in said action and are being claimed in compliance with Rule 54(d) and 54(e)(3) of the Idaho Rules of Civil Procedure.

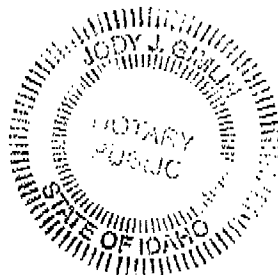
DATED this 1st day of March, 2013.

Karin Seubert  
KARIN SEUBERT

STATE OF IDAHO,                     )  
  : ss.  
COUNTY OF NEZ PERCE.    )

SUBSCRIBED and SWORN to before me this 1st day of March, 2013.

(SEAL)



Jody J. Smith  
NOTARY PUBLIC for State of Idaho  
Residing at Washoula, WA  
My Commission Expires: 7/31/2018

MEMORANDUM OF COSTS  
AND ATTORNEY FEES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MEMORANDUM OF COSTS AND ATTORNEY FEES* was, this 1st day of March, 2013.

☒ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
by first class mail; or  
☐ transmitted via facsimile  
☐ transmitted via e-mail

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
KARIN SEUBERT

**Karin Seubert**  
**JONES, BROWER & CALLERY, P.L.L.C.**  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813

Case No. CV 2012-277  
 Filed 3/1/13  
 at 12:15 o'clock PM  
Carrie Bird  
 By [Signature] Clerk  
 Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

Case No. CV 2012-00277

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

**AFFIDAVIT IN SUPPORT OF  
 MEMORANDUM OF COSTS AND  
 ATTORNEY FEES**

STATE OF IDAHO )  
 : ss  
 County of Nez Perce )

KARIN SEUBERT, being first duly sworn, deposes and says:

That I am an attorney duly admitted to practice law before the Courts of the State of Idaho. The firm of Jones, Brower and Callery has been retained by Toni Johnson to defend against the Petition for Supervised Administration and Removal of Trustee dated July 11, 2012. I am well informed as to the costs, disbursements and attorney fees of Toni Johnson in defending against said Petition; that to the best of my knowledge and belief, the items in Exhibits A and B to this Affidavit are correct and that the said disbursements have been necessarily incurred in this action and are being claimed in compliance with Rule 54(d) and 54(e)(3) of the Idaho Rules of Civil Procedure. I make this Affidavit on behalf of Toni Johnson and in support of the

AFFIDAVIT IN SUPPORT OF  
 MEMORANDUM OF COSTS  
 AND ATTORNEY FEES



Memorandum of Costs and Attorney Fees and, in particular, in support of a request for costs in the sum of \$66.00 and for attorney's fees in the sum of \$6,422.50, for a total of Six Thousand Four Hundred Eighty Eight and 50/100 Dollars (\$6,488.50).

To date either I have performed the following professional services in connection with said Petition for Supervised Administration and Removal of Trustee dated July 11, 2012:

See Exhibit A attached hereto and made a part hereof.

That the attorney time of the office for Karin Seubert was charged at the rate of \$150.00 per hour. Said rate is within the rates prevailing in the Second Judicial District for the State of Idaho.

In my opinion, based upon the appropriate factors to be considered by the Court, confirmation of \$6,488.50 to Toni Johnson for costs and attorney fees necessarily expended in the good faith defense of this action is reasonable.

Said figure specifically excludes amounts incurred for the probate of the estate of John Henry Cornell, deceased, or in defending against the Petition by Kareen Cornell as Personal Representative of the Estate of John Henry Cornell and as Surviving Spouse of John Henry Cornell, Deceased Beneficiary of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell for Supervised Administration and Court Ordered Distribution filed February 26, 2013 and related filings and discovery filed prior to and since the filing of said second Petition.

Additionally, to date, this firm has advanced the following costs for a filing fee in connection with the defense of the Petition for Supervised Administration and Removal of Trustee dated July 11, 2012:

See Exhibit B attached hereto and made a part hereof.

In my opinion, based on the appropriate factors to be considered by the Court, an award

AFFIDAVIT IN SUPPORT OF  
MEMORANDUM OF COSTS  
AND ATTORNEY FEES

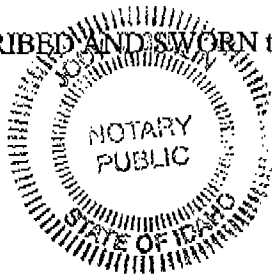
of Sixty Six Dollars (\$66.00) to Toni Johnson for costs necessarily expended in the good faith defense of this action is reasonable.

DATED this 1st day of March, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
KARIN SEUBERT

SUBSCRIBED AND SWORN to before me this 1st day of March, 2013.



Judy J. Simlin  
Notary Public in and for the State of Idaho  
Residing at Lewiston, Idaho Clarkston WA  
My commission expires 7/21/18.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *AFFIDAVIT IN SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEY FEES* was, this 1st day of March, 2013, hand-delivered by providing a copy to Valley Messenger Service addressed to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
KARIN SEUBERT

AFFIDAVIT IN SUPPORT OF  
MEMORANDUM OF COSTS  
AND ATTORNEY FEES

**EXHIBIT A: Attorney Fees**

<u>Date</u>	<u>Service Provided</u>	<u>Time</u>	<u>Fee</u>
8/12/2012	Initial consultation.	1.50	\$100.00 (flat fee)
8/15/2012	Reviewed pleadings and trust documents. Prepared notice of appearance, motion to continue.	2.00	\$300.00
8/20/2012	Reviewed correspondence. Research. Telephone conferences with client and Aherin.	1.00	\$150.00
8/21/2012	Multiple telephone conferences re: John Cornell's death. Letter to Aherin. Attended telephonic motion hearing.	2.15	\$322.50
8/27/2012	Telephone conference with client.	0.25	\$37.50
8/29/2012	Telephone conference with client.	No charge	-
9/14/2012	Research. Prepared Motion to Dismiss and notice.	2.00	\$300.00
9/27/2012	Reviewed Motion to Vacate. Telephone conference with Aherin.	0.25	\$37.50
9/28/2012	Telephone conference with client. Confirming letter.	0.50	\$75.00
10/1/2012	Attended telephonic status conference. Telephone conference with client.	0.50	\$75.00
10/4/2012	Reviewed deposition notice. Telephone conference with Aherin.	0.25	\$37.50
10/12/2012	Research. Prepared Motion for Protective Order and related documents, correspondence.	1.50	\$225.00
10/15/2012	Telephone conference with client.	0.25	\$37.50
10/16/2012	Telephone conferences with Aherin and Court.	0.25	\$37.50
10/16/2012	Telephone conference with client.	0.25	\$37.50
10/17/2012	Preparation for and attended Motion for Protection Order telephonically.	1.00	\$150.00
10/17/2012	Telephone conference with client. Confirming letter.	0.75	\$112.50
10/30/2012	Telephone conference with Ted Creason.	0.25	\$37.50
10/30/2012	Research. Prepared Memorandum of Law.	3.00	\$450.00
11/14/2012	Reviewed response brief and affidavits. Research.	2.00	\$300.00
11/15/2012	Research. Started reply brief.	No charge	-
11/19/2012	Research. Completed reply brief.	4.00	\$600.00
11/21/2012	Telephone conference with client.	No charge	-
11/27/2012	Traveled to/from Orofino. Attended hearing on Motion to Dismiss, which was continued.	3.00	\$450.00
11/28/2012	Telephone conference with Creason's office. Correspondence.	No charge.	-
12/10/2012	Telephone conference with Creason. Reviewed file.	1.00	\$150.00
12/10/2012	Telephone conference with Creason.	0.25	\$37.50
12/14/2012	Telephone conference with Creason.	0.25	\$37.50

AFFIDAVIT IN SUPPORT OF MEMORANDUM OF  
COSTS AND ATTORNEY FEES

<u>Date</u>	<u>Service Provided</u>	<u>Time</u>	<u>Fee</u>
12/27/2012	Telephone conference with client.	0.25	\$37.50
1/8/2013	Telephone conference with client. Hearing preparation.	1.00	\$150.00
1/8/2013	Travel to/from Orofino. Attended hearing on Motion to Dismiss.	4.00	\$600.00
1/10/2013	Telephone conferences with Aherin and Creason.	1.00	\$150.00
1/11/2013	Conference call with Court, Aherin and Creason.	0.50	\$75.00
1/22/2013	Telephone conference with client.	0.25	\$37.50
1/22/2013	Reviewed Creason memorandum. Research.	0.50	\$75.00
1/23/2013	Letter to client. Research.	1.00	\$150.00
2/1/2013	Research. Prepared reply brief.	4.00	\$600.00
2/6/2013	Prepared for second hearing on Motion to Dismiss.	1.00	\$150.00
2/6/2013	Travel to/from Orofino. Attended second hearing on Motion to Dismiss.	3.00	\$150.00
2/19/2013	Reviewed Judgment and Memorandum Decision.	No charge	-
3/1/2013	Prepared Memorandum of Costs and Attorney Fees and related documents.	1.00	<u>\$150.00</u>
	TOTAL		\$6,422.50

AFFIDAVIT IN SUPPORT OF MEMORANDUM OF  
COSTS AND ATTORNEY FEES

**EXHIBIT B: Costs**

Cost Incurred

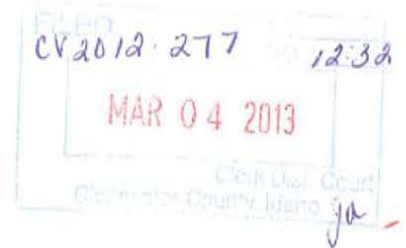
Amount

Filing Fee

\$66,00

AFFIDAVIT IN SUPPORT OF MEMORANDUM OF  
COSTS AND ATTORNEY FEES

**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**MOTION TO DISMISS**

Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and pursuant to I.R.C.P. 12(b)(6), hereby moves this honorable Court for an order dismissing the Petition by Kareen Cornell as Personal Representative of the Estate of John Henry Cornell and as Surviving Spouse of John Henry Cornell, Deceased Beneficiary of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell for Supervised Administration and Court Ordered Distribution filed February 26, 2013 in the above-entitled action.

This Motion is made on the basis that Petitioner Kareen Cornell, as personal representative of the Estate of John Henry Cornell, deceased, has failed to state a claim upon which relief may be granted. Respondent reserves the right to submit supplemental briefing and authority in support of her Motion in advance of the hearing on this Motion in accordance with I.R.C.P. 7(b)(3).

MOTION TO DISMISS

-1-

DATED this 1st day of March, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MOTION TO DISMISS* was, this 1st day of March, 2013,

☒ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
by first class mail; or  
☐ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert



**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813

CV 2012-277 12:32  
MAR 14 2013  
Clerk Dist. Court  
County of Idaho ja

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:	)	
	)	Case No. CV 2012-00277
THE REVOCABLE FAMILY TRUST OF	)	
MICHAEL S. CORNELL AND ARLIE M.	)	<b>MOTION FOR PROTECTIVE ORDER</b>
CORNELL.	)	
_____	)	

Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and pursuant to I.R.C.P. 26(c), hereby moves this honorable Court for an order protecting Respondent from *Notice of Taking Deposition of Toni C. Johnson* dated February 12, 2013, attached hereto as Exhibit A, and *Petition, Personal Representative of the Estate of John Cornell, Kareen Cornell's First Set of Interrogatories and First Set of Requests for Production and Requests for Admission Propounded to Respondent* dated February 12, 2013 attached hereto as Exhibit B.

This Motion is made on the basis that said discovery unreasonably subjects Respondent to undue burden and expense, specifically incurring attorney's fees in preparing for and attending said deposition and responding to said discovery, where it remains in dispute whether Petitioner Kareen Cornell has stated a claim upon which relief may be granted. The *Petition by Kareen Cornell as Personal Representative of the Estate of John Henry Cornell and as Surviving Spouse of John Henry*

*Cornell, deceased beneficiary of the Revocable Family Trust of Michael C. Cornell and Arlie M. Cornell for Supervised Administration and Court Ordered Distribution* (“Second Petition”) is largely duplicative of the *Petition for Supervised Administration and Removal of Trustee* (“First Petition”) filed by John Henry Cornell, which this Court has dismissed and concluded that such claims did not survive the death of John Henry Cornell.

As the record of the case reflects, this is not new territory in this action. The current posture of the case is the same as was previously before the Court in October 2012, when this Court entered its *Order of Protection from Discovery* on October 17, 2012 protecting Respondent from discovery then sought by attorney Darrel Aherin representing (then deceased) John Henry Cornell.

To that end, although the Court had made an oral ruling in open court on February 5, 2013, the written *Judgment for Dismissal* and *Memorandum Opinion* were not entered until February 15, 2013 - after the subject deposition had been propounded. This Court’s *Order of Protection from Discovery* dated October 17, 2012 remains by its terms in effect until the decision itself was entered. While said Order specifically references the *Notice of Deposition Duces Tecum of Toni Johnson* dated October 3, 2012, the clear intent of said Order was to suspend discovery until it was determined whether any claims had survived the death of John Henry Cornell. Therefore, the premature nature of the discovery now at issue violated the intent of this Court’s *Order of Protection from Discovery* dated October 17, 2012.

Additionally, the discovery at issue was propounded before now Petitioner Kareen Cornell had even filed her Second Petition on February 26, 2013. At that time, no pleadings of any party were pending before the Court in this action. As such, Petitioner Kareen Cornell had no authority to propound discovery as discovery may only be obtained regarding “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” While Respondent acknowledges that depositions may be taken by an expected adverse party, the requirements of I.R.C.P. 27 were not complied with in this instance.

For these reasons, Respondent requests entry of a court order protecting Respondent from

discovery, specifically including the Notice and Requests attached hereto, until such time as the Court enters a decision on the pending *Motion to Dismiss* dated March 1, 2013.

Oral argument is requested.

DATED this 1st day of March, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MOTION FOR PROTECTIVE ORDER* was, this 1st day of March, 2013,

☒ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
by first class mail; or  
☐ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell

RECEIVED

FEB 13 2013

JONES, BROWER & GALLERY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:	)	Case No. CV 2012-00277
	)	
THE REVOCABLE FAMILY TRUST OF	)	NOTICE OF TAKING DEPOSITION
MICHAEL S. CORNELL AND ARLIE M.	)	OF TONI C. JOHNSON
CORNELL.	)	
	)	

**TO: RESPONDENT, TONI C. JOHNSON, TRUSTEE OF THE REVOCABLE  
FAMILY TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL,  
AND TO KARIN SEUBERT, HER ATTORNEY**

PLEASE TAKE NOTICE that the undersigned attorney for Kareen Cornell, Personal Representative of the Estate of John C. Cornell, will take the testimony, upon oral examination, of Toni C. Johnson before K&K Reporting, certified shorthand reporters of the State of Idaho, or in the case of their inability to act or be present, before some other person authorized to administer oaths, on Wednesday, March 22, 2013, at the hour of 9:00 a.m. of that day and thereafter from day to day as the taking of the deposition may be adjourned, at the offices of Creason, Moore, Dokken & Geidl, PLLC, 1219 Idaho Street, Lewiston, Idaho 83501.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 12<sup>th</sup> day of February, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Theodore O. Creason, ISB # 1563

Attorneys for Kareen Cornell, Personal

Representative of the Estate of John Henry Cornell

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of February, 2013, a copy of the foregoing NOTICE OF TAKING DEPOSITION OF TONI C. JOHNSON was served by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

Keith and Kristi Evans  
Certified Court Reporters  
P. O. Box 574  
Lewiston ID 83501

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, Idaho 83501



Theodore O. Creason, ISB #1563

Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell

RECEIVED

FEB 18 2013

JONES, BROWER & CALLEY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

)  
) Case No. CV 2012-00277  
)  
)

) **PETITIONER, PERSONAL**  
) **REPRESENTATIVE OF THE ESTATE**  
) **OF JOHN CORNELL, KAREEN**  
) **CORNELL'S FIRST SET OF**  
) **INTERROGATORIES AND FIRST SET**  
) **OF REQUESTS FOR PRODUCTION**  
) **AND REQUESTS FOR ADMISSION**  
) **PROPOUNDED TO RESPONDENT**  
)

**TO: RESPONDENT, TONI C. JOHNSON, TRUSTEE OF THE REVOCABLE  
FAMILY TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL,  
AND TO KARIN SEUBERT, HER ATTORNEY**

YOU WILL PLEASE TAKE NOTICE that petitioner Kareen Cornell, as Personal Representative of the Estate of John Henry Cornell, requires respondent to answer the following Interrogatories, within thirty (30) days from the date of service herein, pursuant to Rule 33 of the Idaho Rules of Civil Procedure; that said Interrogatories shall be answered separately and fully under oath in writing and said answers shall contain the composite knowledge which is available to respondent personally or through her attorney, agents, officers, directors, employees, insurers,

**PETITIONER'S FIRST SET OF  
DISCOVERY REQUESTS - 1**

**EXHIBIT** B

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston, ID 83501  
(208) 743-1516; Fax: (208) 746-2231

or accountants; that said Interrogatories shall be deemed to be continuing, and if respondent or her attorney discovers additional information as to the matter inquired of in these Interrogatories between the time the answers are made and the time of trial, supplemental answers should be made informing petitioner Kareen Cornell and her attorney as to the newly discovered information prior to trial.

Pursuant to Rule 34 of the Idaho Rules of Civil Procedure, petitioner Kareen Cornell, as Personal Representative of the Estate of John Henry Cornell, requires that respondent produce and/or permit the authorized representatives of said petitioner to inspect and copy the documents and things requested herein on March 20, 2012, at 2:00 p.m., at the offices of Creason, Moore, Dokken & Geidl, PLLC, 1219 Idaho Street, Lewiston, Idaho 83501, or at such other time and place convenient to counsel for the petitioner prior thereto.

Petitioner Kareen Cornell, as Personal Representative of the Estate of John Henry Cornell, requires that respondent respond to the following Requests for Admission, within thirty (30) days from the date of service herein, pursuant to Rule 36 of the Idaho Rules of Civil Procedure.

## **I. GENERAL PROCEDURES**

1. You are requested to produce all documents in your possession, custody, or control that are described below. In so doing, please furnish documents that are in the possession of your employees, attorneys, insurers, accountants, or agents, or that are otherwise subject to your custody or control. All documents that respond, in whole or in part, to any portion of the production requests set forth below shall be produced in their entirety, INCLUDING ALL ATTACHMENTS AND ENCLOSURES.

2. When identifying a document, specifically state separately the following for each:
- (a) The type of document (e.g., letter, interoffice memo, etc.);
  - (b) Information sufficient to identify the document, including its date, the name of the addressee(s), the name of the signor(s), the title or heading of the document and the number of pages;
  - (c) The identity of the person or persons to whom copies were sent;



(d) The present or last known location of the original of the document or, if that is unavailable, the most legible copy; and

(e) If any document was, but is no longer in your possession, custody or control, state what disposition was made of it and the reason for such disposition.

3. When identifying a person, furnish information separately for each individual sufficient to identify and locate the person, including, to the extent that the information is available, the full name and present or last known address of the person, together with the person or entity by whom said person is employed or with whom he or she is affiliated and his or her position therein.

4. IF YOU CONTEND THAT ANY OF THE DOCUMENTS SOUGHT BY THIS REQUEST ARE PRIVILEGED OR OTHERWISE PROTECTED FROM PRODUCTION IN WHOLE OR IN PART OR IF YOU OTHERWISE OBJECT TO ANY OF THESE REQUESTS, STATE SEPARATELY FOR EACH SUCH DOCUMENT THE REASONS FOR EACH OBJECTION OR NON-PRODUCTION AND IDENTIFY EACH DOCUMENT WITHHELD FROM PRODUCTION BY ITS AUTHOR, DATE, RECIPIENT OR RECIPIENTS, ALL INDIVIDUALS WHO RECEIVED COPIES OF THE DOCUMENT AND THE GENERAL SUBJECT MATTER.

5. If you object to any part of a request for production, produce all documents responding to the request to which you do not object and, as to each part to which you do object, set forth the basis for the objection and the documents being withheld pursuant thereto.

6. You must respond under oath to these discovery requests within thirty (30) days of the date on which they were served.

7. THESE REQUESTS FOR PRODUCTION ARE CONTINUING. IN THE EVENT YOU DISCOVER FURTHER INFORMATION OR DOCUMENTATION THAT ALTERS, MODIFIES, DELETES OR AUGMENTS THE ANSWERS GIVEN NOW OR ANY TIME HEREFTER, YOU ARE TO PROVIDE SUCH INFORMATION BY SUPPLEMENTAL ANSWERS AND/OR PRODUCTION OF SUCH DOCUMENTS.

## II. DEFINITIONS

For purposes of these discovery requests, the following terms shall have the meanings set forth:

1. **AND or OR** mean **AND/OR**, with the singular form being deemed to include the plural and vice versa.

2. **DOCUMENT or DOCUMENTS** is used in the broadest possible sense and means, writings of every kind or character pertaining to the designated subject matter, including, without limitation, the original and any copy or draft, regardless of origin or location, of any book, pamphlet, periodical, letter, memorandum, diary, file, note, calendar, newspaper,

magazine, statement, bill, invoice, order, policy, telegram, correspondence, summary, receipt, opinion, investigation statement or report, schedule, manual, financing statement, audit, tax return, articles of incorporation, bylaws, stock book, minute book, agreement, contract, deed, security agreement, mortgage, deed of trust, title or other insurance policy, report, record, study, handwritten note, map, drawing, working paper, chart, paper, index, tape, microfilm, data sheet, data processing card, computer printout, computer program, check, bank statement, passbook, or any other written, typed, printed, photocopied, dittoed, mimeographed, telecopied, faxed, recorded, transcribed, punched, taped, filmed, photographic or graphic matter, however produced. **DOCUMENT or DOCUMENTS** includes the file and folder tabs associated with each document as above-described, all correspondence transmitting such documents or explaining or commenting on the contents thereof, and all working or supporting papers.

3. **IDENTIFY, IDENTITY or IDENTIFICATION** means (a) when used with reference to a natural person, to state his or her full name, present home address, present business address, present home and business telephone numbers, and present or last known position and/or business affiliation; (b) when used with reference to an entity, such as a partnership (either general or limited), joint venture, trust corporation, to state the full legal name of such entity, each trade name under which such entity does business, the entity's telephone number and the identity of the chief operating officer, manager, trustee or other principal representative or managing agent or agents; and (c) when used with reference to documents, state specifically (i) the type of document involved (e.g., letter, interoffice memorandum, etc.), the date it was prepared, the preparer, all distributees, its title or the heading and the number of pages; and (ii) the identity of the custodian or other person last known to have possession of the document together with the present or last known location of the document.

4. **PERSON or PERSONS** refers to any natural person or any entity other than a natural person including, but not limited to, any business entity whether a sole proprietorship, corporation, partnership, limited partnership, association, joint venture, co-venture, and any other legally recognized entity of any description whatever, as well as all divisions, departments, affiliates, subsidiaries, or other subunits of the foregoing entities.

5. **RELATING TO or RELATE TO** means pertinent, relevant, or material to, evidencing, having a bearing on, concerning, affecting, discussing, dealing with considering or otherwise relating in any manner whatsoever to the subject matter of the inquiry.

6. **STATEMENT** refers to any oral, written, stenographic, electronic or recorded declaration of any kind or description.

7. **DEFENDANTS** refers to the defendants Rob Vance and Becky Vance, either collectively or individually, unless otherwise specifically indicated.

### **III. INTERROGATORIES, REQUESTS FOR PRODUCTION & REQUESTS FOR ADMISSION**

**INTERROGATORY NO. 1:** Set forth the following as to all assets held by the Trust during the time which you have served as a Trustee (whether joint or sole), including, but not limited to, assets which have since been consumed or transferred during administration and assets which have been generated or acquired during administration.

- (a) Description of asset;
- (b) Location of asset;
- (c) Estimated fair market value of asset; and
- (d) Any and all administrative action taken with regard to asset.

**ANSWER:**

**INTERROGATORY NO. 2:** Set forth all actions taken by you to distribute the assets of the Trust during the time which you have served as a Trustee (whether joint or sole) of the Trust.

**ANSWER:**

**REQUEST FOR PRODUCTION NO. 1:** Please produce copies of all financial accountings of the Trust, whether created before or during the time which you have served as a Trustee.

**RESPONSE:**

**REQUEST FOR PRODUCTION NO. 2:** Please produce a copy of a current financial accounting of the Trust.

**RESPONSE:**

**INTERROGATORY NO. 3:** Set forth all facts regarding the manner in which the the accountings produced in response to Requests for Production Nos. 2 & 3 were generated.

**ANSWER:**

**INTERROGATORY NO. 4:** Set forth the name and contact information for any and all persons assisting with the accountings produced in Response to Requests for Production Nos. 2&3 and those persons assisting with the creation or review of information upon which those accountings were based.

**ANSWER:**

**INTERROGATORY NO. 5:** With respect to those assets which have since been consumed or transferred during administration and assets which have been generated or acquired during administration, please set forth the following:

- (a) The date the asset was consumed, transferred, generated or acquired;
- (b) Name, address and telephone number of the person to whom the property was transferred or sold, or from whom property was acquired;
- (c) The sales price or consideration for the asset; and
- (d) Name, address and telephone number of any persons with personal knowledge regarding the facts set forth in your answers to (a)-(d) .

**ANSWER:**

**REQUEST FOR PRODUCTION NO. 3:** Please produce a copy of all written documents evidencing the sale or transfer of the property referred to in the preceding interrogatory.

**RESPONSE:**

**REQUEST FOR PRODUCTION NO. 4:** Please produce a copy of all correspondence between you and the decedent, John Henry Cornell, including correspondence through which you advised him of the state of Trust assets and your administration of the Trust.

**RESPONSE:**

**INTERROGATORY NO. 6:** Do you intend to rely on any statement, whether oral or written, given by Maragaret Watkins or Kareen Cornell, or any of their representatives or agents to support any of your claims or defenses? If your answer is in the affirmative, please state:

- (a) The name, address and telephone number of the person making the statement;
- (b) The date and place the statement was made;
- (c) The name, address and telephone number of the person to whom the statement was made;
- (d) The name, address and telephone number of each person who was present when the statement was made;
- (e) If the statement was oral, please briefly describe the content of the statement.

**ANSWER:**

**REQUEST FOR PRODUCTION NO. 5:** Please produce any and all statements referred to in the preceding interrogatory, whether in written or electronic format.

**RESPONSE:**

**INTERROGATORY NO. 7:** Do you intend to rely on statement, whether oral or written, given by the decedent, John Henry Cornell, or any of the decedent's representatives or agents to support any of your claims or defenses? If your answer is in the affirmative, please state:

- (a) The name, address and telephone number of the person making the statement;
- (b) The date and place the statement was made;
- (c) The name, address and telephone number of the person to whom the statement was made;
- (d) The name, address and telephone number of each person who was present when the statement was made;
- (e) If the statement was oral, please briefly describe the content of the statement.

**ANSWER:**

**REQUEST FOR PRODUCTION NO. 6:** Please produce any and all statements referred to in the preceding interrogatory, whether in written or electronic format.

**RESPONSE:**

**INTERROGATORY NO. 8:** If you, your attorney, or any other person, firm, or corporation acting on your behalf consulted with or engaged any experts you intend to call at trial

in connection with this litigation, please fully identify each such expert. For each such expert, state the following:

(a) Set forth in full and complete detail the nature of his/her education and training, including the name and address of each school or university where (s)he received special education or training in the field in which (s)he is expected to testify, the date (s)he attended each institution, and the degree or certifications received from each institution;

(b) If any expert tested, analyzed, or examined any physical evidence relating to this litigation, state the dates on which such test, analysis, or examination was conducted and identify, all persons who assisted or were present;

(c) Set forth in full and complete detail the substance of the facts, conclusions, and opinions to which each expert is expected to testify;

(d) Identify each person who has present custody of each item tested, analyzed, or examined by each such expert;

(e) Identify each document reporting or setting forth the objective findings, opinions, or conclusions of each expert; and

(f) Describe in detail all facts and opinions underlying your expert's opinion(s).

**ANSWER:**

**REQUEST FOR PRODUCTION NO. 7:** Please produce a copy of the documents referred to in subsection (e) of the preceding interrogatory.

**RESPONSE:**



**INTERROGATORY NO. 9:** Please identify all exhibits you intend to offer in evidence at the time of trial.

**ANSWER:**

**INTERROGATORY NO. 10:** Identify all witnesses who you intend to or may call as witnesses to testify in support of your claims or defenses in this action, and specify the substance of the subject matter of the testimony as it is expected to be given by each witness.

**ANSWER:**

**INTERROGATORY NO. 11:** Please identify by name, address, telephone number, employer and job title each person who was consulted or who assisted in the answering of these discovery requests, or who furnished information which was used in answering them.

**ANSWER:**

**INTERROGATORY NO. 12:** Identify each and every person by name, address and telephone number who has any knowledge or purports to have any knowledge of the facts of this case and a brief description of the knowledge held by each person, if known.

**ANSWER:**

**REQUEST FOR PRODUCTION NO. 8:** Please produce copies of all records not produced in response to one of the foregoing requests that are in your possession, custody or control regarding administration of the Trust.

**RESPONSE:**

**REQUEST FOR ADMISSION NO. 1:** Admit that John Henry Cornell transferred real property into the Trust.

**RESPONSE:**

**INTERROGATORY NO. 14:** Set forth all facts upon which you base any claim of legal interest in the real property discussed in Request for Admission No. 1.

**ANSWER:**

DATED this 27<sup>th</sup> day of February, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC




Theodore O. Creason, ISB # 1563  
Attorneys for Kareen Cornell, Personal  
Representative of the Estate of John Henry Cornell

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 2<sup>nd</sup> day of February, 2013, a copy of the foregoing PETITIONER, KAREEN CORNELL'S, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN CORNELL, FIRST SET OF INTERROGATORIES AND FIRST SET OF REQUESTS FOR PRODUCTION AND REQUESTS FOR ADMISSION PROPOUNDED TO RESPONDENT was served by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

  
Theodore O. Creason, ISB #1563

MAR 04 2013

**Karin Seubert**  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

Case No. CV 2012-00277

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )  
 \_\_\_\_\_ )

**NOTICE OF HEARING**

YOU WILL PLEASE TAKE NOTICE that Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C. will call up for hearing her *Motion for Protective Order* dated March 1, 2013 at the hour of 3:00 p.m. on March 13, 2013, before the Honorable Magistrate of the above Court.

DATED this 1st day of March, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
 Karin Seubert  
 Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *NOTICE OF HEARING* was, this 1st day of March, 2013,

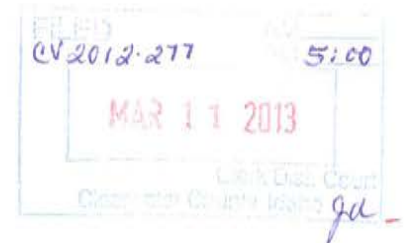
☒ hand-delivered by providing a  
\_\_\_\_\_ copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
\_\_\_\_\_ mailed, postage pre-paid,  
\_\_\_\_\_ by first class mail; or  
\_\_\_\_\_ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorneys for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

OBJECTION TO HEARING

COMES NOW Margaret Watkins, by and through her attorney, Darrel W. Aherin, of Aherin, Rice and Anegon, and objects to the Court hearing the Respondent Toni C. Johnson's Motion for Protective Order on March 13, 2013.

I.R.C.P. 7(b)(3)(A) provides that the Notice of Hearing shall be filed and served so the parties receive the Notice of Hearing and Motion no later than fourteen (14) days before the hearing.

On March 1, 2013, a Motion for Protective Order and Notice of Hearing for March 13, 2013, was received by the undersigned. Clearly fourteen days notice was not provided. Serving the Notice on March 1, 2013, means the earliest a hearing could have been noticed for hearing is March 15, 2013.

Because the proper procedure regarding notice was not provided the hearing cannot be called on for hearing on March 13, 2013.

OBJECTION TO HEARING -- 1

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DATED this 11<sup>th</sup> day of March, 2013.

AHERIN, RICE & ANEGON

By Darrel W. Aherin  
Darrel W. Aherin  
Attorney for Petitioner

### CERTIFICATE OF SERVICE

I, Darrel W. Aherin, hereby certify that on the 11<sup>th</sup> day of March, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile 746-9553
- ☐ Federal Express

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
Attorney at Law  
1219 Idaho  
P.O. Drawer 835  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile 746-2231
- ☐ Federal Express

By Darrel W. Aherin  
Darrel W. Aherin



Case No. CU-2012-277  
Filed March 13, 2013  
at 4:03 o'clock P M  
By OB Clerk  
OB Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, AND FOR THE COUNTY OF IDAHO

IN THE MATTER OF	)	CASE NO. CV2012-277
	)	
MICHAEL S. CORNELL, ETAL	)	COURT MINUTES
	)	
	)	
	)	

\_\_\_\_\_  
Randall W. Robinson, Presiding Judge

Courtney Baker: Deputy Clerk

Plaintiff's Council:

Defendant's Council:

Date: 03/13/2013 Time: 3:05 - a.m. Tape: CD554-1

Subject of proceeding: Eviction Hearing

=====

FOOTAGE:

- 3:05 Honorable Randall W. Robinson, Magistrate Judge, presiding. Parties present in the court room: Mr. Aherin, Mr. Creason, and Ms. Seubert present telephonically.
- 3:05 Court addresses Mr. Aherin's objection to the motion for protective order hearing
- 3:06 Mr. Aherin states his objection.
- 3:06 Ms. Seubert addresses Mr. Aherin's objection to the hearing.
- 3:07 Court explains that it deems appropriate to move the hearing date up.
- 3:08 Mr. Aherin asks about the deposition scheduled, on March 22, 2013.
- 3:10 The Court states that it would be appropriate for Mr. Aherin to file a notice of appearance.
- 3:11 The court addresses the Protective order.
- 3:11 Ms. Seubert addresses the Protective order.
- 3:16 Mr. Creason addresses the Protective order.
- 3:27 The Court questions on why they would need discovery at this point.

3:28 Parties explain why they want discovery.

3:32 Court addresses the matter at hand.

3:37 Parties address the trust.

3:45 The Court addresses concerns.

3:50 Court will allow discovery.

3:51 Ms. Seubert discusses briefing dates.

3:52 Mr. Creason discusses briefing dates.

3:56 Written discovery is to be completed by April 15, 2013; Deposition is to be completed by April 22, 2013; Motion to dismiss hearing June 4, 2013

4:01 Court is in recess.



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for Margaret Watkins

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

MOTION TO DISALLOW COSTS AND  
ATTORNEY FEES CLAIMED BY TONI C.  
JOHNSON AGAINST THE TRUST

COMES NOW Darrel W. Aherin of Aherin, Rice & Anegon, on behalf of Margaret Watkins and moves the Court pursuant to I.R.C.P. 54(d)(6) for an order disallowing the costs and attorney fees sought in the Memorandum of Costs and Attorney Fees filed by Toni C. Johnson and Affidavit in Support of Memorandum of Costs and Attorney Fees as follows:

Under the terms of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell, dated November 1, 1996, hereinafter "The Trust," Michael S. Cornell and Arlie M. Cornell, or the survivor between them, were Co-Trustees. The Trust further provided that upon the death or incapacity of the last survivor of the initial trustees, Toni C. Johnson and John H. Cornell would act as successor trustees. This could not be modified after Arlie M. Cornell died.

After the death of Arlie M. Cornell, Michael S. Cornell illegally modified The Trust to appoint Toni C. Johnson as sole successor trustee upon his death or incapacity, and John H.

MOTION TO DISALLOW COSTS AND  
ATTORNEY FEES CLAIMED BY TONI C.  
JOHNSON AGAINST THE TRUST -- 1

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Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

Cornell as trustee in the event Toni C. Johnson could not act. Section 1.06 of The Trust provides that amendments to The Trust could be made "during the *joint* lives of the Trustors" (emphasis added).

Toni C. Johnson has been serving as sole successor trustee since the death of Michael S. Cornell on December 15, 2009 in violation of the trust.

No inventory of the assets in The Trust at the time of the death of Michael S. Cornell has been provided.

The Trust, Section 4.03 provides as follows:

On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: TONI C. JOHNSON AND JOHN H. CORNELL.

Toni C. Johnson is asking this court to continue rewarding her for intentionally breaching the trust because the trust terminated on December 15, 2009. Toni C. Johnson should pay the attorney fees personally because had she distributed the assets timely, the claimed attorney fees and costs would not have been incurred.

The main asset of The Trust is the house and real property. Toni C. Johnson has been residing in the house since Michael S. Cornell's death on December 15 2009. The property remains in the name of The Trust and was not distributed to the two beneficiaries "*as soon as reasonably possible*". Toni C. Johnson has paid no rent during her tenancy of the premises.

Toni C. Johnson has mismanaged the Trust in that she has used a substantial amount of the monies available to pay both expenses of maintaining the real property, where she has resided for three years and to pay her personal expenses. No money was distributed to John Henry Cornell.

Toni C. Johnson has breached her fiduciary duty to settle and distribute the Trust in accordance with the terms of the Trust. The actions and mismanagement of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell by Toni C. Johnson are the sole cause of this action.

The Trust should not be responsible for Toni C. Johnson's attorney fees or costs.

Oral argument is requested.

MOTION TO DISALLOW COSTS AND  
ATTORNEY FEES CLAIMED BY TONI C.  
JOHNSON AGAINST THE TRUST -- 2

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Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

DATED this 14<sup>th</sup> day of March, 2013.

AHERIN, RICE & ANEGON

By Darrel W. Aherin  
Darrel W. Aherin

### CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 14<sup>th</sup> day of March, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
P.O. Box 854  
Lewiston, ID 83501

☐ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile 746-9553  
☐ Federal Express

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

☐ U.S. Mail  
☐ Hand Delivery  
☒ Facsimile 746-2231  
☐ Federal Express

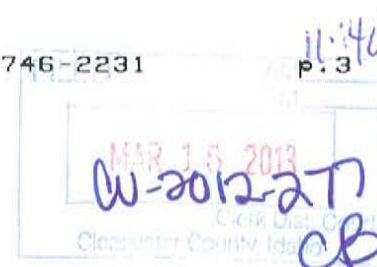
Darrel W. Aherin  
DARREL W. AHERIN

MOTION TO DISALLOW COSTS AND  
ATTORNEY FEES CLAIMED BY TONI C.  
JOHNSON AGAINST THE TRUST -- 3

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Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho





Theodore O. Creason, ISB #1563  
 Samuel T. Creason ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Petitioner/Personal Representative  
 Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

) Case No. CV 2012-00277

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

) **MOTION TO DISALLOW COSTS AND  
 ATTORNEY FEES (I.R.C.P. 54(d)(6))**

COMES NOW Kareen Cornell, Personal Representative of the Estate of John Henry Cornell, by and through her attorney of record, Theodore O. Creason of Creason, Moore, Dokken & Geidl, PLLC, and hereby moves this Court to disallow all or part of the costs and attorney fees set forth in Toni Johnson's Memorandum of Costs and Attorney Fees. Ms. Cornell basis this motion upon the authorities and arguments set forth in the Memorandum in Support filed herewith.

DATED this 15th day of March, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

Theodore O. Creason, ISB #1563

Attorneys for Petitioner/Personal Representative

**MOTION TO DISALLOW COSTS AND ATTORNEY  
 FEES (I.R.C.P. 54(d)(6)) - 1**


Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston, ID 83501  
 (208) 743-1516; Fax: (208) 746-2231

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15th day of March, 2013, I filed the foregoing **MOTION TO DISALLOW COSTS AND ATTORNEY FEES (I.R.C.P. 54(d)(6))** with the Clerk of the Court (via facsimile to (208) 476-9315), and also **delivered a copy via facsimile** to the following persons at the fax numbers designated below:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501  
*Fax: 208-746-3650*

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501  
*Fax: 208-746-9553*

  
\_\_\_\_\_  
Theodore O. Creason, ISB #1563



MAR 15 2013  
W-2012-277  
CB

Theodore O. Creason, ISB #1563  
 Samuel T. Creason ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Petitioner/Personal Representative  
 Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARIJE M.  
 CORNELL.

)  
 ) Case No. CV 2012-00277  
 )  
 )

) **MEMORANDUM IN SUPPORT**  
 )  
 ) **RE: MOTION TO DISALLOW**  
 ) **COSTS AND ATTORNEY FEES**  
 ) **(I.R.C.P. 54(d)(6))**  
 )

**PRELIMINARY STATEMENT**

Karcen Cornell, Personal Representative of the Estate of John Henry Cornell (hereinafter, "Estate") objects to Johnson's memorandum of costs and attorney fees on the grounds that the fees should not be awarded. Toni Johnson brings her claim for attorney fees pursuant to Idaho Code § 15-8-208. Section 15-8-208 provides that the court "may, in its discretion, order costs, including reasonable attorney's fees . . . ." The Court should disallow Johnson's motion for fees because (1) Johnson failed to identify the source from which she is seeking an award of fees; (2) an award cannot be granted against the Estate, as it is not a party to the action; (3) an award

**MEMORANDUM IN SUPPORT RE: MOTION TO  
 DISALLOW COSTS AND ATTORNEY FEES  
 (I.R.C.P. 54(d)(6)) - 1**

Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston, ID 83501  
 (208) 743-1516; Fax: (208) 746-2231

should not be granted against John Cornell, as doing so would be inequitable; and (4) an award should not be granted against the property of the Trust until such time as Johnson has apprised the Court of the state of the Trust.

### ANALYSIS

#### **I. Procedural Requirements**

A party's claim for attorney fees is to be "processed in the same manner as costs and included in the memorandum of costs; provided, however, the claim for attorney fees as costs shall be supported by an affidavit of the attorney stating the basis and method of computation of the attorney fees claimed." Idaho R. Civ. P. 54(c)(5). A proper memorandum of costs "may not be filed later than fourteen (14) days after entry of judgment." Idaho R. Civ. P. 54(d)(5). "Any party may object to the claimed costs of another party . . . by filing and serving on adverse parties a motion to disallow part or all of such costs within fourteen (14) days of service of the memorandum of cost." Idaho R. Civ. P. 54(d)(6). Johnson served the memorandum of costs upon Cornell on March 1, 2013. Therefore, if the Estate is deemed a party, then the Estate has through Friday, March 15, 2013 to file its motion to disallow the claimed costs and fees.

#### **II. Substantive Standards**

**Filing Fee:** Johnson seeks recovery of the initial appearance filing fee of \$66.00. This is a cost that is awarded to the prevailing party "by right", subject to the Court's discretion to disallow the cost. *See* IRCP 54(d)(1)(C). Limitation would be particularly appropriate here where the Court is considering continuing the action and, therefore, Johnson will not be assessed

an additional initial appearance filing fee. She may seek recovery of such a fee should she prevail in the anticipated litigation.

**Attorney Fees:** Johnson raises Idaho Code § 15-8-208 as the statutory grounds upon which she claims attorney fees. Section 15-8-208 places determinations regarding an award of fees within the sound discretion of the district court. The Court may award reasonable attorney fees (a) from a party to the proceedings; (b) from the assets of the trust; or (c) from any non-probate asset that is the subject of the proceeding. Johnson has failed to set forth the source from which she seeks an award of fees. Johnson's failure to identify the requested source of the fees has deprived the parties against whom the fees may be awarded of their right to due process. See *Farber v. Howell*, 111 Idaho 132, 136, 721 P.2d 731, 735 (Ct. App. 1986) (holding that Rule 54 satisfies the requirements of due process because it provides the relevant party notice and an opportunity to be heard). The Court should not exercise its discretion in awarding fees where Johnson has failed to provide clear notice to the party against whom she seeks a recovery.

Johnson should not be awarded fees from the Estate. The Court had not recognized the Estate as a party to this proceeding due, in part, to Johnson's opposition of the Estate's intervention. Therefore, the Estate was not a party to the proceeding. Nor is the Estate holding property of the Trust or non-probate assets that are the subject of the proceeding. Thus, the Court should not award Johnson fees from the Estate.

Johnson should not be awarded fees from John Cornell. Johnson sought and received a dismissal of Cornell's petition on the grounds that because Cornell is deceased (1) there exists no standing to bring claims in his name, and (2) the claims in the petition abated upon his death. In

determining whether to award fees against a party under section 15-8-208, the courts consider whether an award would be equitable. *Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Trust*, 147 Idaho 117, 133, 206 P.3d 481, 497 (2009). An award against John Cornell would be inequitable for the two reasons.

1. Johnson did not prevail on whether John Cornell could establish the prima facie elements of the causes of action pled. Rather, Johnson prevailed on the issue of abatement of those causes of action upon the unfortunate and unforeseen demise of John Cornell. In fact, Johnson has sought to avoid disclosure regarding her administration of the Trust—facts which would support the causes of action by means of motions for protective orders. While those motions may not be improper, the unwillingness to disclose facts which would either support or refute the petition renders an award against John Cornell for bringing those actions inequitable.

2. An award of attorney's fees against John Cornell would most likely result in a claim against the Estate. The Estate has requested approval to proceed in this matter, which Johnson has opposed. The Court should not effectively grant an award against the Estate where the Estate has not, despite its objections, been recognized as a party to the action.

Finally, Johnson should not be awarded fees from assets of the Trust, at least until such time as Johnson apprises the Court of the status of the Trust. This Court holds "full and ample authority" to administer and settle the Trust and all trust matters. Idaho Code § 15-8-102(1). John Cornell asked this Court to intervene based upon allegations that Johnson has mismanaged the Trust. Johnson has not yet apprised the Court *or any other interested party* of the state of the Trust assets. An award to Johnson out of the Trust assets for fees incurred by Johnson in

defendant against allegations of mismanagement, where Johnson has made no showing that those allegations were false, would result in an inequity.

### CONCLUSION

Johnson asks this Court to order a discretionary award of fees pursuant to Idaho Code § 15-8-208. The Court should decline to grant Johnson's request on the following grounds:

- (1) Johnson failed to identify the source from which she is seeking an award of fees;
- (2) an award cannot be granted against the Estate, as it is not a party to the action;
- (3) an award should not be granted against John Cornell, as doing so would be inequitable; and
- (4) an award should not be granted against the property of the Trust until such time as Johnson has apprised the Court of the state of the Trust.

DATED this 15th day of March, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



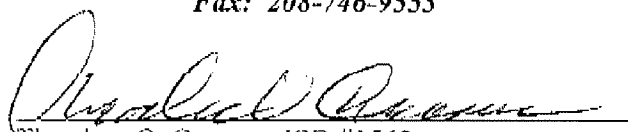
Theodore O. Creason, ISB #1563  
Attorneys for Petitioner/Personal Representative

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15th day of March, 2013, I filed the foregoing **MEMORANDUM IN SUPPORT RE: MOTION TO DISALLOW COSTS AND ATTORNEY FEES (I.R.C.P. 54(d)(6))** with the Clerk of the Court (via facsimile to (208) 476-9315), and also **delivered a copy via facsimile** to the following persons at the fax numbers designated below:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501  
**Fax: 208-746-3650**

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501  
**Fax: 208-746-9553**

  
Theodore O. Creason, ISB #1563

MAR 15 2013  
CV-2012-277  
CB

Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

Case No. CV 2012-00277

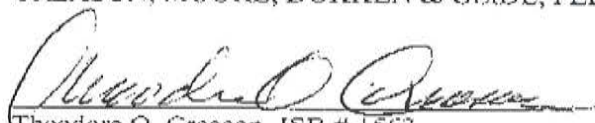
THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

**NOTICE OF HEARING RE: MOTION  
TO DISALLOW COSTS AND  
ATTORNEY FEES (I.R.C.P. 54(d)(6))**

Notice is hereby given that the undersigned will call on for hearing Motion to Disallow Costs and Attorney Fees (I.R.C.P. 54(d)(6)) on Wednesday, April 10, 2013, at 9:00 a.m., telephonically. Counsel for each party should call (208) 476-8998 to connect with the Judge and attend the Hearing. If counsel intends to attend in person, the hearing will be heard in the courtroom at the Clearwater County Courthouse, Orofino, Idaho.

DATED this 15<sup>th</sup> day of March, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
Theodore O. Creason, ISB # 1563  
Attorney for Petitioner Kareen Cornell

**NOTICE OF HEARING RE: MOTION TO  
DISALLOW COSTS AND ATTORNEY FEES  
(I.R.C.P. 54(d)(6)) - 1**

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston, ID 83501  
(208) 743-1516; Fax: (208) 746-2231

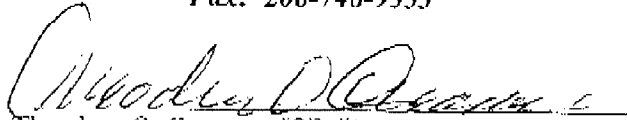


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15th day of March, 2013, I filed the foregoing **NOTICE OF HEARING RE: MOTION TO DISALLOW COSTS AND ATTORNEY FEES (I.R.C.P. 54(d)(6))** with the Clerk of the Court (via facsimile to (208) 476-9315), and also **delivered a copy via facsimile** to the following persons at the fax numbers designated below:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501  
**Fax: 208-746-3650**

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501  
**Fax: 208-746-9553**

  
Theodore O. Creason, ISB #1563

Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Petitioner/Personal Representative  
Of the Estate of John Henry Cornell



**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:	)	Case No. CV 2012-00277
	)	
THE REVOCABLE FAMILY TRUST OF	)	AMENDED NOTICE OF TAKING
MICHAEL S. CORNELL AND ARLIE M.	)	DEPOSITION OF TONI C. JOHNSON
CORNELL.	)	
	)	

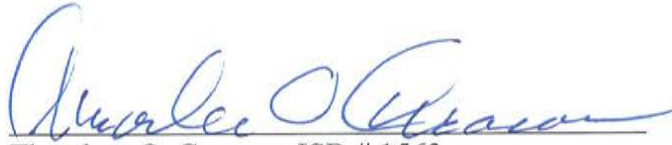
**TO: RESPONDENT, TONI C. JOHNSON, TRUSTEE OF THE REVOCABLE  
FAMILY TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL,  
AND TO KARIN SEUBERT, HER ATTORNEY**

PLEASE TAKE NOTICE that the undersigned attorney for Kareen Cornell, Personal Representative of the Estate of John C. Cornell, will take the testimony, upon oral examination, of Toni C. Johnson before Keith Evans of K&K Reporting, certified shorthand reporters of the State of Idaho, or in the case of their inability to act or be present, before some other person authorized to administer oaths, on **Monday, April 22, 2013, at the hour of 9:00 a.m.** of that day and thereafter from day to day until the taking of the deposition may be adjourned, at the offices of Creason, Moore, Dokken & Geidl, PLLC, 1219 Idaho Street, Lewiston, Idaho 83501.

This deposition shall be taken pursuant to the Idaho Rules of Civil Procedure.

DATED this 19<sup>th</sup> day of March, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Theodore O. Creason, ISB # 1563

Attorneys for Kareen Cornell, Petitioner/Personal  
Representative of the Estate of John Henry Cornell

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 20<sup>th</sup> day of March, 2013, a copy of the foregoing AMENDED NOTICE OF TAKING DEPOSITION OF TONI C. JOHNSON was served by hand delivering a **paper copy** to each named individual at the addresses indicated below:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, Idaho 83501



Theodore O. Creason, ISB #1563



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for Margaret Watkins

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

NOTICE OF APPEAL  
Category L(2)  
Fee \$61.00

TO: TONI C. JOHNSON, KAREEN CORNELL AND THE CLERK OF THE ABOVE-  
ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. Margaret Watkins appeals to the District Court from the Magistrate's Judgment for Dismissal granting Toni C. Johnson's Motion for Summary Judgment entered in the above-entitled case on February 15, 2013, Honorable Randall W. Robinson presiding.

2. Margaret Watkins, an interested person, has a right to appeal because she was appointed temporary personal representative and defended Toni Johnson's Motion for Summary Judgment. The Estate has a right to appeal to the District Judge Division of the District Court in the County of Clearwater the Judgment described in Paragraph 1 pursuant to Section 17-201(7) of the Idaho Code.

3. The appeal is taken upon matters of both law and fact.



4. The proceedings of the hearings were recorded or reported by the method of electronic recordings and are in the possession of the Clearwater County Clerk located in Orofino, Idaho. No record of the proceedings are being requested.

5. The statement of issues on appeal that Margaret Watkins intends to assert are as follows:


- (a) Does a breach of the contractual provisions of a trust by a trustee equate to a personal injury tort which would allow the trustee/beneficiary to personally benefit from the death of the other beneficiary.
- (b) Should the beneficiary/trustee personally benefit from the intentional breach of a trust contract by the beneficiary/trustee.
- (c) Is a breach of the fiduciary duties by a beneficiary/trustee to be rewarded by claiming the breach sounds in tort so the beneficiary that dies after being intentionally denied his distribution of assets under a contract by the beneficiary/trustee forfeits his assets to the trustee who breached her contractual duty to distribute the assets as soon as possible.
- (d) Did the court incorrectly apply Idaho Code § 5-327 by not holding the property damage claim did not abate.
- (e) Does equity allow the intentional breach of a trust contract by the beneficiary/trustee to be rewarded to the detriment of the beneficiary.

6. The above list of issues is not exhaustive and Margaret Watkins may assert other issues on appeal thereafter discovered by Margaret Watkins.

7. That this Notice of Appeal is not intended to stay or delay other discovery proceedings or petitions that have been filed by Kareen Cornell.

DATED this 25<sup>th</sup> day of March, 2013.

AHERIN, RICE & ANEGON

By   
Darrel W. Aherin  
Attorney for Margaret Watkins

CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 25<sup>th</sup> day of March, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

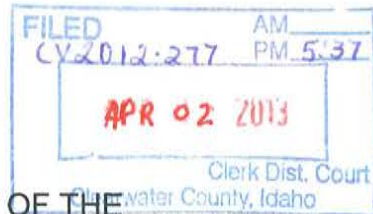
Karin Seubert  
Jones, Brower, & Callery, PLLC.  
P.O. Box 854  
Lewiston, ID 83501

- ☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Federal Express

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

- ☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Federal Express

  
DARREL W. AHERIN



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: ) New Case No. : CV2012-00277  
)  
) CLERKS TRANSMITTAL OF COURT  
) FILE AND CERTIFICATE OF APPEAL  
The Revocable Family Trust of ) TO DISTRICT COURT  
Michael S. Cornell and Arlie M )  
Cornell )  
\_\_\_\_\_) )

TO: The District Court of the Second Judicial District, in and for the County of  
Clearwater

Transmitted is the case filed in the above captioned case.

APPEAL FROM: Magistrate Division

ORDER OR JUDGMENT APPEALED FROM: Judgment for Dismissal  
filed February 15, 2013.

HEARING DATE: February 6, 2013

APPEALED BY: Margaret Watkins, Personal Representative

NOTICE OF APPEAL FILED: 03/26/2013

APPEAL FEE PAID: \$61.00

ATTORNEY FOR APPELLANT: Darrel W. Aherin

ATTORNEY FOR RESPONDENT: None

OTHER ATTORNEYS: None

DATED this 02<sup>nd</sup> Day of April 2013.

CARRIE BIRD  
Clerk of the District Court

By Jodie Allam  
Deputy Clerk

CLERKS TRANSMITTAL OF  
COURT FILE AND CERTIFICATE OF  
APPEAL TO DISTRICT COURT - 1



## CERTIFICATE OF MAILING

I, hereby certify that a true and correct copy of the foregoing Clerk's Transmittal of Court File and Certificate of Appeal To District Court was hand-delivered, faxed or mailed, postage pre-paid, on the 2nd day of April, 2013 to:

Karin Seubert  
Jones, Brower & Callery, PLLC  
P.O. Box 854  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By *Robin Gillain*  
Deputy Clerk



4/4/2013  
FILED 12:46 p.m. AT  
BY PROFINO, IDAHO  
Jf

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNY OF CLEARWATER

IN THE MATTER OF:

CASE NO. CV 2012-277

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE  
M. CORNELL.

ORDER FOR BRIEFING

Notice of Appeal was filed March 26, 2013.

A transcript of proceedings is not necessary.


Margaret Watkins shall submit a brief in support of her appeal no later than May 13, 2013.

All other interested parties shall file any responsive briefs no later than 28 days after service of Ms. Watkins' brief.

Ms. Watkins shall file any reply brief no later than 21 days after service of any responsive briefs.

Failure to comply with this briefing schedule by the appellant may result in the dismissal of the appeal.

So ORDERED this 4<sup>th</sup> day of April, 2013.

  
Michael J. Griffin  
District Judge

CERTIFICATE OF MAILING

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that a copy of the foregoing was mailed to, faxed to, or delivered by me on the 4<sup>th</sup> day of April, 20 13, to:

Darrel Aherin  
Aherin, Rice & Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

✓ U.S. Mail

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

✓ U.S. Mail

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501

✓ U.S. Mail



Carrie Bird, Clerk of Court

By: C. Gering  
Deputy Clerk



AHERIN, RICE & ANEGON

Darrel W. Aherin

1212 Idaho Street

P.O. Drawer 698

Lewiston, ID 83501-0698

(208) 746-3646

ISB# 1534

Attorney for John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

STIPULATION RESCHEDULING  
HEARING

COME NOW the parties to the above-referenced case, by and through their respective counsel of record, and hereby stipulate and agree that the hearing currently scheduled for April 10, 2013 at 9:00 a.m. on the Personal Representative's Motion to Disallow Costs and Attorney Fees is rescheduled to Wednesday, April 17, 2013 at 9:30 a.m. telephonically. Counsel for each party should call (208) 476-8998 to connect with the Judge and attend the hearing. If counsel intends to attend in person, the hearing will be heard in the courtroom at the Clearwater County Courthouse, Orofino, Idaho.

DATED this 9<sup>th</sup> day of April, 2013.

AHERIN, RICE & ANEGON

By Darrel W. Aherin

Darrel W. Aherin

Attorney for Margaret Watkins

Apr 09 13 09:31a Creason, Moore, & Dokken

(208) 746-2231

P.3

APR-08-2013 17:23 From: AHERIN RICE ANEGON 2087463650

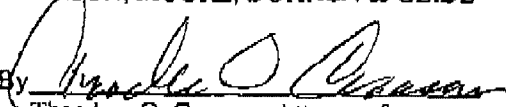
To: 7462231

Page: 3/3

DATED this 7<sup>th</sup> day of April, 2013.

CREASON, MOORE, DOKKEN & GEIDL

By

  
Theodore O. Creason, Attorney for  
Personal Representative

DATED this \_\_\_\_\_ day of April, 2013.

JONES, BROWER & CALLERY

By

\_\_\_\_\_  
Karin Seubert, Attorney for  
Toni C. Johnson

04-09-'13 08:30 FROM-JB & C

2087469553

T-423 P0004/0004 F-251

Page: 3/3

DATED this \_\_\_\_\_ day of April, 2013.

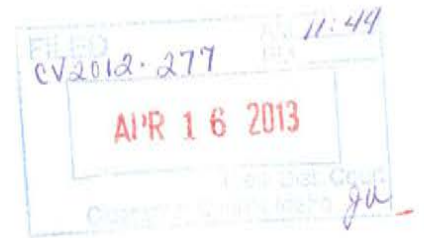
CREASON, MOORE, DOKKEN & GEIDL

By \_\_\_\_\_  
Theodore O. Creason, Attorney for  
Personal Representative

DATED this 9 day of April, 2013.

JONES, BROWER & CALLERY

By Karin Seubert  
Karin Seubert, Attorney for  
Toni C. Johnson



JONES, BROWER & CALLERY, P.L.L.C.  
Karin Seubert (ISB No. 7813)  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501  
(208) 743-3591  
Attorneys for Respondent, TONI C. JOHNSON

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

CASE NO. CV 2012-00277

NOTICE OF SERVICE

I, KARIN SEUBERT, attorney for Respondent Toni Johnson, pursuant to I.R.C.P., Rule 33(a)(5), certify that on the 15th day of April, 2013, the original and one copy (without attachments) of *Respondent's Answers to Kareen Cornell's First Set of Interrogatories and First Set of Requests for Production and Requests for Admission* were hand-delivered to Theodore O. Creason, Creason, Moore, Dokken & Geidl, 1219 Idaho Street, Lewiston, ID 83501 **-and-** one copy (with attachments) was hand-delivered to Darrel W. Aherin, Aherin, Rice & Anegon, 1212 Idaho Street, Lewiston, ID 83501.

DATED this 15th day of April, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

Karin Seubert

Karin Seubert



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing *NOTICE OF SERVICE* were this 15 day of April, 2013, hand-delivered to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
KARIN SEUBERT

**Karin Seubert**  
**JONES, BROWER & CALLERY, P.L.L.C.**  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

Case No. CV 2012-00277

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

**AMENDED NOTICE OF HEARING**

YOU WILL PLEASE TAKE NOTICE that Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C. will call up for hearing her *Motion to Dismiss* dated March 1, 2013 at the hour of 4:00 p.m. on Tuesday, June 4, 2013, before the Honorable Magistrate of the above Court.

DATED this 7 day of May, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By

Karin Seubert

Karin Seubert

Attorney for Respondent

AMENDED NOTICE OF HEARING

-1-

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *AMENDED NOTICE OF HEARING* was, this 7 day of May, 2013,

☐ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
by first class mail; or  
☒ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

Karin Seubert  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

Case No. CV 2012-00277

MEMORANDUM OF LAW IN  
 SUPPORT OF SECOND MOTION  
 TO DISMISS

Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., hereby submits this *Memorandum of Law* in support of Respondent's *Motion to Dismiss* dated March 1, 2013. Said *Motion* is set for hearing on June 4, 2013.

I. FACTS AND PROCEDURAL BACKGROUND

Background

Michael S. Cornell and Arlie M. Cornell established the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell on November 1, 1996. *Petition for Supervised Administration and Court Ordered Distribution of Trust* at ¶¶ 3.1, 3.4, Exh. A (said Exhibit hereinafter referred to as "Trust"). Through said Trust, Mr. and Mrs. Cornell named their two children, Toni C. Johnson and John H. Cornell, as the beneficiaries of the trust upon Mr. and

MEMORANDUM OF LAW

-1-

Mrs. Cornell's deaths. *Id.* at § 4.03 of Exh. A. On August 6, 2009, Michael S. Cornell as surviving grantor and trustee named Toni C. Johnson as sole trustee/successor trustee. *Id.* at Exh. B.

Arlie M. Cornell died on November 9, 2008 and Michael S. Cornell died on December 15, 2009. *Id.* at ¶¶ 3.4, 3.6.

*Litigation Concerning Cornell Revocable Living Trust*

On July 11, 2012, John H. Cornell filed a *Petition for Supervised Administration and Removal of Trustee*, which originally initiated this proceeding. *Id.* at ¶¶ 2.3, 3.9.

John H. Cornell died on or around August 20, 2011 leaving no issue. *Id.* at ¶ 3.10.

Respondent Toni C. Johnson filed a *Motion to Dismiss* on September 17, 2012 seeking to dismiss the *Petition for Supervised Administration and Removal of Trustee* on the basis that the claims of John H. Cornell were extinguished by his death.

Briefing in support of and in opposition to dismissal was submitted by Ms. Seubert for Respondent and Mr. Aherin for John Henry Cornell (and presumably for Margaret Watkins who as of November 15, 2012 served as temporary personal representative of the Estate of John Henry Cornell). *Memorandum of Law* filed November 1, 2012; *Response to Respondent's Motion to Dismiss* filed November 15, 2012; *Respondent's Reply Brief in Support of Motion to Dismiss* filed November 20, 2012. Said Motion was first called for hearing on November 27, 2012, at which time it was continued to allow participation by Kareen Cornell.

Said Motion was called for hearing for a second time on January 8, 2013, at which time Ms. Seubert on behalf of the Respondent and Mr. Aherin on behalf of John Henry Cornell (and presumably Margaret Watkins who at that time served as temporary personal representative of the Estate of John Henry Cornell) presented oral argument. Mr. Creason did not participate at

that hearing on Kareen Cornell's behalf due to what was later discovered to be a misunderstanding.

Subsequent briefing in support of and in opposition to dismissal was submitted by Ms. Seubert for Respondent and Mr. Creason for Kareen Cornell. *Memorandum re: Respondent's Motion to Dismiss* filed January 18, 2013; *Respondent's Brief in Reply to Brief of Surviving Spouse* filed February 4, 2013.

Said Motion was called for hearing for a third time on February 6, 2013, at which Ms. Seubert for Respondent, Mr. Aherin for John Henry Cornell (and at that time Margaret Watkins as temporary personal representative of the Estate of John Henry Cornell), and Mr. Creason for Kareen Cornell presented oral argument.

After considering the above-referenced briefing and oral argument presented, this Court issued an oral ruling in open court on February 12, 2013 dismissing the *Petition for Supervised Administration and Removal of Trustee* and granted the Estate twenty days in which to raise any claims of the Estate. A written opinion and judgment followed. *Id.* at ¶ 3.11; *Memorandum Opinion and Judgment for Dismissal* entered February 15, 2013.

Margaret Watkins, as a self-identified "interested person," has filed an appeal of said *Memorandum Opinion and Judgment for Dismissal*, which remains pending before the District Court.

On February 26, 2013, Kareen Cornell as then personal representative of the Estate of John H. Cornell and as his surviving spouse, filed a *Petition for Supervised Administration and Court Ordered Distribution*.

On March 4, 2013, Respondent filed a *Motion to Dismiss*. This Memorandum of Law is submitted in support of said *Motion to Dismiss*.

*Estate of John H. Cornell, deceased*

John H. Cornell died on or around August 20, 2011 leaving no issue. *Id.* at ¶ 3.10.

On November 15, 2012, in the probate action concerning the Estate of John H. Cornell, deceased, Margaret Watkins was appointed as Temporary Personal Representative of the Estate of John H. Cornell, deceased. See *Order of Appointment of Temporary Personal Representative*, Clearwater County Case No. CV 2012-00439.

On February 12, 2013, in the probate action concerning the Estate of John H. Cornell, deceased, Kareen Cornell was appointed as personal representative of the Estate of John H. Cornell, deceased, thereby terminating the prior temporary appointment of Margaret Watkins. See *Order Appointing Personal Representative, Letters of Testamentary*, Clearwater County Case No. CV 2012-00439.

## II. ARGUMENT

### A. Summary Judgment Standard

The parties and the Court have agreed in open court that Respondent's *Motion to Dismiss* shall be treated as a request for summary judgment on the expectation that the Estate of John H. Cornell, deceased, will submit information obtained through discovery in opposition to the Motion to Dismiss.

Summary judgment must be granted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). The party seeking summary judgment has the initial burden of proving an absence of a genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). All facts and reasonable inferences will be considered in favor of the non-moving party. *Summers v.*



*Cambridge Joint School Dist. No. 432*, 139 Idaho 953, 955, 88 P.3d 772, 774 (2004).

However, the non-moving party cannot “rest upon the mere allegations or denials of that party’s pleadings, but the party’s response ... must set forth specific facts showing that there is a genuine issue for trial.” *Shere v. Pocatello Schoo Dist. No 25*, 143 Idaho 486, 489-90, 148 P.3d 1232, 1235-36 (citing I.R.C.P. 56(c)). As explained below, there are no genuine issues of material facts to preclude dismissal being granted in light of John H. Cornell’s death.

**B. Respondent is entitled to dismissal as a matter of law.**

As the brief summary above reflects, the procedural history of this trust dispute has been highly unusual resulting in the current status of a second lawsuit filed within the original proceeding and the first lawsuit subject to a pending appeal. As such, it does not lend itself to straightforward analysis. It is Respondent’s analysis that the now pending *Petition* is a continuation of the original proceeding, rather than a new and separate lawsuit. Based on this analysis, this Memorandum of Law will not address the doctrine of res judicata, which includes the two legal concepts of issue preclusion and claim reclusion, because said concepts require separate proceedings, which is not present here. See *Berkshire Investments, L.L.C. v. Taylor*, 153 Idaho 73, 278 P.3d 943 (2012). To the extent that the Estate argues that its *Petition* should be viewed as a separate proceeding within this single case, Respondent reserves the right to respond more fully to any such arguments in her reply brief.

Further, this Memorandum of Law addresses only the claims raised by the Estate of John H. Cornell, not any individual claims of Kareen Cornell as surviving spouse, because a review of the *Petition for Supervised Administration and Court Ordered Distribution* finds no claim individual to Mrs. Cornell and distinct from her capacity of personal representative of the Estate of John H. Cornell and heir of said Estate.

The Estate asserts causes of action for constructive trust (see ¶ 4.5 of *Petition for Supervised Administration and Court Ordered Distribution of Trust*); for breach of contract (see ¶¶ 4.2 and 4.7 of *Petition for Supervised Administration and Court Ordered Distribution of Trust*); for breach of fiduciary duty (see ¶ 4.3 of *Petition for Supervised Administration and Court Ordered Distribution of Trust*); for conversion (see ¶ 4.4 of *Petition for Supervised Administration and Court Ordered Distribution of Trust*); and for unjust enrichment (see ¶ 4.6 of *Petition for Supervised Administration and Court Ordered Distribution of Trust*). This Memorandum will first discuss the application of law of the case doctrine to this proceeding, and then each alleged action.

1. The Memorandum Opinion is binding upon the Estate, subject to the outcome of the appeal.

In its *Memorandum Opinion* entered February 15, 2010, this Court determined that the claims of breach of fiduciary duty and constructive trust that were filed by John H. Cornell during his lifetime and pursued by his attorney after his death were abated by his death under the common law, and are not within the scope of express limits of Idaho Code § 5-327(2). See *Memorandum Opinion* at 10 ("John's claims abate under common law. The alleged wrongful acts of Toni are all breaches of fiduciary duties under state law that for purposes of abatement are in the nature of torts. In the absence of any state law supplanting the common law, John's claims are abated and must be dismissed."); at 13 ("The constructive trust argument is indistinguishable from John's arguments regarding Toni's breaches of fiduciary duties."); at 17 ("The damages John seeks - recovery of property wrongfully withheld from him - do not meet the definition of out of pocket expenses. Therefore, Idaho Code § 5-327(2) does not overrule the common law abatement of John's causes of action.").

This decision is binding upon the Estate, who is not entitled to a second bite at the

proverbial apple because Kareen Cornell, the surviving wife of John H. Cornell, has succeeded Margaret Watkins, the decedent's aunt, as personal representative.

This Court specifically provided that "Kareen shall be given twenty days to substitute for John and present issues free of the pleadings filed by John's attorney during John's lifetime." *Memorandum Opinion* at 13.

The litigation of the first *Petition* centered upon Respondent's alleged breach of fiduciary duty as trustee. See *id.* The only "newly" pled fact contained within the second *Petition for Supervised Administration and Court Ordered Distribution of Trust* is that "on or about January 3, 2007, John Henry Cornell deposited by quitclaim, separate property into the Trust in the form of Lot 34, Lakeview First Addition, real property adjacent to real property owned by his parents, Michael S. and Arlie M. Cornell, into the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell." See *Petition for Supervised Administration and Court Ordered Distribution of Trust* at ¶ 3.8. This allegation is irrelevant to the causes of action pled or to the Motion to Dismiss. Further, said act pre-dates the Grantors' deaths and Respondent's authority as trustee and no relation has been shown to how it relates to the alleged misconduct of Respondent since the death of Michael Cornell.

Absent said *Memorandum Opinion* being overturned on appeal, the Estate is precluded from re-litigating the issues previously addressed by this Court under the law of the case doctrine. The Idaho Supreme Court discussed the law of the case doctrine in a very recent decision stating as follows:

This Court adheres to the "law of the case" doctrine, which we have articulated as follows:

The doctrine of "law of the case" is well established in Idaho and provides that upon an appeal, the Supreme Court in deciding a case presented states in its

opinion a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case and must be adhered to throughout its subsequent progress, both in the trial court and upon subsequent appeal. The "law of the case" doctrine also prevents consideration on a subsequent appeal of alleged errors that might have been, but were not, raised in the earlier appeal.

*Parkwest Homes, L.L.C. v. Barnson*, I.S.C. No. 38919 (April 18, 2013) (quoting *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000); *Taylor v. Maile*, 146 Idaho 705, 709, 201 P.3d 1282, 1286 (2009)). Further, "where the district court acts in an appellate capacity, and appeal to the Supreme Court is subsequently dismissed by stipulation, the rulings of the district court became the final rulings in the case, not subject to attack in this appeal, and which stated the law of the case that the magistrate - and even this appellate court - must follow in this appeal." *Swanson v. Swanson*, 134 Idaho 512, 515, 5 P.3d 973, 976 (2000) (quoting *Wulff v. Peralta*, 123 Idaho 567, 568, 850 P.2d 216, 217 (Ct.App. 1993). Further, to the extent a litigant fails to avail herself from appealing a trial court's ruling, the "law of the case" doctrine precludes the litigant from re-opening the issue at a later time. *Id.* at 516-17, 5 P.3d at 978-79.

Here, Margaret Watkins had filed an appeal of the *Memorandum Opinion*. Said appeal remains pending before the District Court. No stay has been sought to preclude the presiding magistrate from ruling on the *Motion to Dismiss* now before the Court. Subject to the outcome of the appeal, the *Memorandum Opinion* remains the law of the case and is binding upon the Estate under the "law of the case" doctrine.

Respondent anticipates that it is the Estate's position that it is not bound by the Court's earlier ruling because neither the Estate nor Kareen Cornell were a party to said action. Said argument is flawed because all authority of the Estate, of Margaret Watkins acting previously as temporary personal representative, or of Kareen Cornell now acting as personal representative was derived from John H. Cornell. At all times since his death, the Estate of John H. Cornell has

been the only legitimate party adverse to Respondent in this proceeding.

Here, John H. Cornell filed an action for breach of fiduciary duty. Upon his death, the Estate of John H. Cornell became the successor to John H. Cornell. Upon his death, his former attorney continued to defend the decedent's interest in this litigation and opened a probate action through which Margaret Watkins was initially appointed as temporary personal representative. The acts of Margaret Watkins as temporary personal representative relate back in time to John H. Cornell's date of death. See I.C. § 15-3-701. A review of the Idaho Probate Code finds no reference to the term "temporary personal representative." The only reasonable reading and application of Title 15, Chapter 3, Idaho Code is that a "temporary personal representative," when acting reasonably for the benefit of the interested persons, possesses full authority to act on behalf of the estate within the authorized parameters of Idaho Code Section 15-3-715, and that any such acts taken in good faith are binding upon the Estate. Application of said principles to this proceeding requires the confirmation of all actions taken by Margaret Watkins, including those of the decedent's attorney, now Ms. Watkins' attorney, as binding upon the Estate of John H. Cornell, deceased. This includes such acts being binding upon the Estate and its current personal representative Kareen Cornell.

For these reasons, any effort by Kareen Cornell acting as personal representative or of the Estate generally to claim that they were not parties to the earlier action are misplaced and should be disregarded by the Court. The law does not provide for a second bite at the proverbial apple. Instead, the Court's consideration of the Motion to Dismiss should center on whether the *Petition for Supervised Administration and Court Ordered Distribution of Trust* raises facts or issues of law not previously addressed by this Court that were not abated by the death of John H. Cornell. For the reasons discussed below, no such facts or issues have been raised and the

Motion to Dismiss should be granted.

2. The facts alleged in the subject Petition do not support a cause of action for constructive trust.

The Estate alleges that “[a]s a result of [Respondent]’s inequitable conduct, [Respondent] holds assets, personally in constructive trust, for the Estate and/or the Trust. ... [Respondent]’s actions constitute inequitable conduct giving rise to a constructive trust for all assets (a) obtained by [Respondent], personally, through the inequitable conduct; or (b) diminished from another’s interest by the [Respondent.]” *Petition for Supervised Administration and Court Ordered Distribution of Trust* at ¶¶ 3.23 and 4.5.

“A constructive trust arises where legal title to property has been obtained through actual fraud, misrepresentations, concealments, taking advantage of one’s necessities, or under circumstances otherwise rendering it unconscionable for the holder of legal title to retain beneficial interest in the property.” *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986) (citing *Davenport v. Burke*, 30 Idaho 559, 167 P. 481 (1917)). A “constructive trust arises from the legal title holder’s wrongful actions and not from any intent to create a trust.” *Snider v. Arnold*, 153 Idaho 641, 289 P.3d 43 (2012) (citing *Davenport v. Burke*, 30 Idaho 599, 608, 167 P. 481, 483 (1917)).

Here, the doctrine of constructive trust is inapplicable because there are no facts alleged that Respondent has obtained legal title to Trust property. Instead, it is undisputed that the Cornell Revocable Living Trust remains the title holder of the relevant real property situated in Clearwater County, not Respondent personally. As such, Mrs. Cornell’s claim for constructive trust must be dismissed.

Further, as discussed above, this Court has previously determined that the “constructive trust argument is indistinguishable from John’s arguments regarding Toni’s breaches of fiduciary

duties," which were abated by John H. Cornell's death. Said determination is binding upon the Estate subject to the outcome of the pending appeal.

For these reasons and the reasons previously briefed and incorporated by reference herein, the Estate's claim for constructive trust should be dismissed subject to the outcome of the pending appeal.

3. The Estate's claim of breach of contract is actually a breach of fiduciary claim, that abates.

The Estate seeks damages for breach of contract, under a straight breach of contract theory and under a third party beneficiary theory. See *Petition for Supervised Administration and Court Ordered Distribution* at ¶¶ 4.2 and 4.7.

This Court has previously determined that "the duties John asserts Toni breaches arise irrespective of contract. The duties are grounded in state law regardless of what the contract states. ... The alleged wrongful acts of Toni are all breaches of fiduciary duties under state law that for purposes of abatement are in the nature of torts. ... John makes no claim against Toni and the administration of the estate of their parents that survives his death under the common law or under Idaho Code § 5-327." *Memorandum Opinion* at 9, 10, 17.

As discussed above, this determination is binding upon the Estate subject to the outcome of the pending appeal.

For these reasons and the reasons previously briefed and incorporated by reference herein, the Estate's claims for breach of contract were extinguished upon the death of John H. Cornell and should be dismissed subject to the outcome of the pending appeal.

4. The Estate's claim for breach of fiduciary duty is abated by John's death.

The Estate alleges that Respondent is liable for alleged breaches of fiduciary duty. See *Petition for Supervised Administration and Court Ordered Distribution* at ¶ 4.3.



This Court has previously determined that such claims were extinguished by the death of John H. Cornell. See *Memorandum Opinion* at 17. Specifically, this Court ruled that the damages John sought, and that the Estate now seeks - recovery of property wrongfully withheld from him - are outside the scope of Idaho Code § 5-327 - thus are not recoverable after John's death. *Id.* As discussed above, this determination is binding upon the Estate subject to the outcome of the pending appeal.

For these reasons and the reasons previously briefed and incorporated by reference herein, the Estate's claims for breach of fiduciary duty were extinguished upon the death of John H. Cornell and should be dismissed subject to the outcome of the pending appeal.

5. The Estate's claim of conversion is abated by John's death.

The Estate alleges that Respondent is liable for alleged conversion. See *Petition for Supervised Administration and Court Ordered Distribution* at ¶ 4.4.

Under Idaho law, conversion is an intentional tort claim. See *Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 77,910 P.2d 744, 749 (1996).

This Court has previously determined that all tort claim were extinguished by the death of John H. Cornell. See *Memorandum Opinion* at 17. Specifically, this Court ruled that the damages John sought, and that the Estate now seeks - recovery of property wrongfully withheld from him - are outside the scope of Idaho Code § 5-327 - thus are not recoverable after John's death. *Id.* As discussed above, this determination is binding upon the Estate subject to the outcome of the pending appeal.

For these reasons and the reasons previously briefed and incorporated by reference herein, the Estate's claim for conversion was extinguished upon the death of John H. Cornell and should be dismissed subject to the outcome of the pending appeal.

6. The Estate's claim of unjust enrichment is a breach of fiduciary duty claim, that abates.

The Estate seeks damages under a theory of unjust enrichment. See *Petition for Supervised Administration and Court Ordered Distribution* at ¶ 4.6.

"Unjust enrichment, as a fictional promise or obligation implied by law, allows recovery where the defendant has received a benefit from the plaintiff that would be inequitable for the defendant to retain without compensating the plaintiff for the value of the benefit." *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 123 Idaho 754, 767, 979 P.2d 627, 640 (1999) (citing *Continental Forest Products, Inc. v. Chandler Supply Co.*, 95 Idaho 739, 743, 518 P.2d 1012, 1205 (1974)). Unjust enrichment claims involve claims based on an implicit promise to pay. *Id.*, 979 P.2d at 640.

The Court's prior analysis of the alleged breach of contract claim is instructive: "the duties John asserts Toni breaches arise irrespective of contract. The duties are grounded in state law regardless of what the contract states. ... The alleged wrongful acts of Toni are all breaches of fiduciary duties under state law that for purposes of abatement are in the nature of torts. ... John makes no claim against Toni and the administration of the estate of their parents that survives his death under the common law or under Idaho Code § 5-327." *Memorandum Opinion* at 9, 10, 17.

The alleged breaches are for breach of fiduciary duty. The Estate does not allege that John H. Cornell conveyed a benefit during his lifetime to Respondent that would support a recoverable claim under the theory of unjust enrichment. Instead, the Estate alleges that Respondent withheld benefits under the Trust from John H. Cornell, which supports a claim of breach of fiduciary duty, which is not recoverable after John H. Cornell's death.

For these reasons and the reasons previously briefed and incorporated by reference

herein, the Estate's claims for breach of contract were extinguished upon the death of John H. Cornell and should be dismissed subject to the outcome of the pending appeal.

7. General creditor's claim must be supported by Idaho law.

The Estate alleges that "as a result of losses suffered from the [Respondent]'s inequitable conduct, the Trust holds a creditor's claim against [Respondent]." *Petition for Supervised Administration and Court Ordered Distribution* at ¶ 3.20.

The term "creditor's claim" is most commonly used in the context of a probate action. See generally Title 15, Ch. 3, Idaho Code. All creditor's claim must be recoverable under Idaho law to be valid.

For the reasons discussed above, the various claims pursued by the Estate were abated by the death of John H. Cornell. See *supra*. The *Petition for Supervised Administration and Court Ordered Distribution* fails to allege any new issues or facts to support a valid claim against Respondent or the Trust. The words of the Court's earlier ruling remain applicable: the Estate "makes no claim against Toni and the administration of the estate of their parents that survives [John's] death under common law or under Idaho Code § 5-327. Under the terms of the trust, John's heirs have no claim against the estate as he left no surviving issue." *Memorandum Opinion* at 17.

### III. CONCLUSION

Based on the foregoing, Respondent Toni Johnson respectfully requests that her Motion to Dismiss be granted and that the Court dismiss the *Petition for Supervised Administration and Court Ordered Distribution* with prejudice subject to the outcome of the pending appeal.

DATED this 7th day of May, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MEMORANDUM OF LAW* was, this 7th day of May, 2013,

\_\_\_\_\_ hand-delivered by providing a  
\_\_\_\_\_ copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
\_\_\_\_\_ mailed, postage pre-paid,  
✓ by first class mail; or  
\_\_\_\_\_ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
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P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

MEMORANDUM OF LAW

-15-



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(208) 746-3646  
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Attorney for Margaret Watkins

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

BRIEF IN SUPPORT OF APPEAL

COMES NOW Darrel W. Aherin of Aherin, Rice & Anegon, on behalf of Margaret Watkins, and provides this Brief in Support of Appeal.

BACKGROUND

This appeal is made by one of the beneficiaries of the trust, John Cornell. Margaret Watkins, John Cornell's aunt, was appointed Temporary Personal Representative and presented John Cornell's claim. After submitting his claim as a beneficiary of the trust, John Cornell died on August 20, 2012 (committed suicide) while residing with his aunt, Margaret Watkins.

John Cornell and Toni Johnson are the children of Michael S. Cornell and Arlie M. Cornell. Michael and Arlie Cornell created a family trust. The beneficiaries of the trust, after the deaths of the parents, were John Cornell and Toni Johnson. On December 15, 2009, Michael Cornell died. Arlie Cornell died on November 9, 2008. Margaret Watkins and Arlie Cornell were sisters.

BRIEF IN SUPPORT OF APPEAL -- 1  
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Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

Toni Johnson was nominated as the sole alternate trustee at the death of Michael Cornell on August 6, 2009, by an improper change made to the trust after Arlie Cornell died.

The trust provides "On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: Toni C. Johnson and John H. Cornell." Memorandum Opinion, p. 2; Trust § 4.03.

There is no factual dispute that Toni Johnson has intentionally not divided the trust assets since Toni Johnson and John Cornell's father, Michael Cornell, died on December 15, 2009, as required by the trust. The trust clearly says "On the death of the surviving Trustor [Michael Cornell], the Trust shall terminate . . ."

In the Memorandum Opinion filed February 15, 2013, on page 3, Judge Robinson stated:

In the nearly two (2) years from the last trustor's death through John's death, Toni failed to distribute any part of the trust to John even while she lived rent free in the home that is included in the trust and apparently paid all her living expenses from trust funds. Toni has not distributed any of the funds from the trust other than for her own use.

Memorandum Opinion, p. 3.

Judge Robinson's factual statement makes it clear that Toni Johnson breached the contract. Judge Robinson has mistakenly applied the wrong legal standard to the current facts. Looking at page 9 of the Memorandum Opinion will illustrate Judge Robinson is wrong that this case is decided on "... state law regardless of what the contract states." The language of the contract controls, not state law. The language in the contract said the trust terminated on Michael Cornell's death and as soon as reasonably possible, distribution of the assets in two equal shares was to be made. Had the contract said the trust continued at the discretion of the trustee, Toni Johnson, and said the trustee had the right to decide when assets were distributed, John Cornell would have had no breach of contract claim. The duties of the trustee are not grounded in state law regardless of what the contract states. The requirements of what the trustee was required to do in this case is controlled by the contract.

#### LEGAL ARGUMENT

This case involves a trust. The written agreement – contract – made it very clear, "... the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income

and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: Toni C. Johnson and John H. Cornell." Trust § 4.03.

The case involved a breach of contract. The contract was breached by Toni Johnson.

The Court ruled the case sounded in tort so the claim abated. The citation on page 5 in the Memorandum Opinion refers to a quote saying "... those sounding in pure tort abate" (emphasis added). The Court did not follow the law because this case does not sound in pure tort.

Judge Robinson discussed both statutory law and the common law. It appears the comparison between *Bishop v. Owens*, 152 Idaho 616, 272 P. 3d 1247 (2012) and this case was relied upon. The use of the cited case was misplaced. In *Bishop* a contract was signed between plaintiff and defendant. The defendant was providing legal services. The Idaho Supreme Court held the standards for performance were the same in the contract as the defendant's professional standards so the case was deemed a tort case. The trust created by contract in this case had very specific terms that are not found in any Idaho law. The terms are specific to the contract. John Cornell alleged these specific contract requirements were breached. The tort damages claimed in *Bishop* were claims for malpractice. The contract damages sought by John Cornell were the specific contract amounts that were his under the written terms of the contract. If the rule of law for tort damages is applied to this case, the contract amounts that belonged to John Cornell will go to the person who intentionally did not timely disburse the assets to John Cornell and if abatement is applied the person who breached the contract will get money that was not hers. Application of common law to this case was misplaced by Judge Robinson because this case is not a pure tort case. The contract is what provides the specific division of the trust property. The contract requirements were not followed so it is a breach of contract, NOT a pure tort claim.

The case is a contract case. A written trust that had specific contractual requirements is a contract. The contract was breached. This is not a pure tort case. The contract/trust was intentionally breached, and the Court's ruling rewards Toni Johnson for intentional breach of the contract. The Court confirmed these facts as set out above. The Court mixed the duties under Idaho statutes for a probate and trust and improperly held the claim of John Cornell abated upon his death because the case was a pure tort case. Claims arising out of a contract generally survive the death of the claimant.



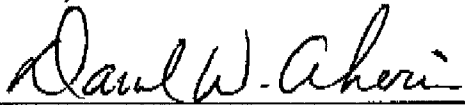
From a review of the Memorandum Opinion, Judge Robinson has concluded Idaho law has evolved to a point where a breach of contract/trust is a tort and the claimant's claim abates if the claimant dies. Where is equity? Judge Robinson's Opinion says a Court is not to consider equity and fairness. Judge Robinson says if the damaged party dies, the breach of contract claim becomes a pure tort claim because of the fiduciary duty of the trustee and abates, and the perpetrator of the breach of the contract is rewarded because the perpetrator had some fiduciary duties. This case is not a "pure tort case." The case law involving claims for personal injury do not apply to this case. Cases involving legal malpractice are founded in tort. A fee agreement may be involved in a legal malpractice case, but the legal duties of a lawyer are based on the standards applied by law to the lawyer. The trust/contract is not a fee agreement in this case. The trust had contractual provisions unique to that contract. The specific contract provisions were breached. That is a breach of contract, not a tort.

#### CONCLUSION

The decision of the Magistrate Court should be reversed. John Cornell's claim for breach of contract did not abate on his death. The party breaching the contract cannot be rewarded for intentionally breaching the contract. The contract language determined what was to be done. To hold otherwise violates Idaho law.

DATED this 13th day of May, 2013.

AHERIN, RICE & ANEGON

By   
Darrel W. Aherin  
Attorney for Appellant

## CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 13th day of May, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

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**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

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 ) Case No. CV 2012-00277  
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**MOTION FOR ORDER SHORTENING  
 TIME FOR HEARING**

COMES NOW Kareen Cornell, Petitioner in this matter and Personal Representative of the Estate of John Henry Cornell, by and through her attorney of record, Theodore O. Creason of Creason, Moore, Dokken & Geidl, PLLC, and hereby moves this Court, pursuant to Idaho Rule of Civil Procedure 7(b)(3), for an order shortening the time for a hearing on the Motion for Stay and to set a hearing to be held on the motion for Friday, May 17, 2013 at 2:30 p.m., to be conducted by telephone conference initiated by movant's counsel. Movant has filed a Petition under Idaho's Trust and Estate Dispute Resolution Act (Idaho Code §§ 15-8-101 *et seq.*) in district court seeking consolidation of this matter with Case No. CV 2012-439 (*In the Matter of the Estate of John Henry Cornell*) and the appeal of Margaret Watkins in this case, currently

**MOTION FOR ORDER SHORTENING  
 TIME OF HEARING – Page 1**

Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston, ID 83501  
 (208) 743-1516; Fax: (208) 746-2231

pending before the district court. This request is made on the grounds that responsive briefing to the Trustee's motion to dismiss is due on or before May 21, 2013. Pursuit of such briefing will cause unnecessary increase in expense of litigation should the district court assume jurisdiction of the case pursuant to the TEDRA petition.

Counsel for the Trustee has stipulated to shortening the time for the hearing. Counsel for all parties are available for a telephone conference on Friday, May 17, 2013 at 2:30 p.m.

DATED this 15<sup>th</sup> day of May, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC


A handwritten signature in black ink, appearing to read 'Theodore O. Creason', written over a horizontal line.

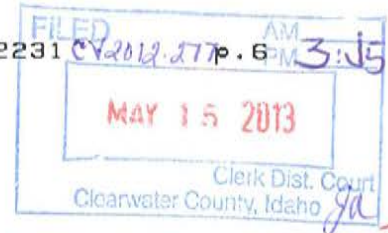
Theodore O. Creason, ISB #1563  
Attorneys for Personal Representative

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15<sup>th</sup> day of May, 2013, I filed the foregoing MOTION FOR ORDER SHORTENING TIME FOR HEARING with the Clerk of the Court, and hand-delivered a paper copy to the following persons:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

  
Theodore O. Creason, ISB #1563



Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

Case No. CV 2012-00277

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

### MOTION TO STAY PROCEEDINGS

COMES NOW Kareen Cornell, Petitioner in this matter and Personal Representative of the Estate of John Henry Cornell, by and through her attorney of record, Theodore O. Creason of Creason, Moore, Dokken & Geidl, PLLC, and hereby moves this Court for an Order staying this proceeding. Movant has filed a Petition under Idaho's Trust and Estate Dispute Resolution Act (Idaho Code §§ 15-8-101 *et seq.*) in district court seeking consolidation of this matter with Case No. CV 2012-439 (*In the Matter of the Estate of John Henry Cornell*) and the appeal of Margaret Watkins in this case, currently pending before the district court. Movant requests this Court stay this proceeding until such time as the district court either assumes jurisdiction over the case under the TEDRA petition or denies the petition for consolidation.

MOTION FOR STAY – Page 1

Crenson, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston, ID 83501  
(208) 743-1516; Fax: (208) 746-2231

DATED this 15<sup>th</sup> day of May, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

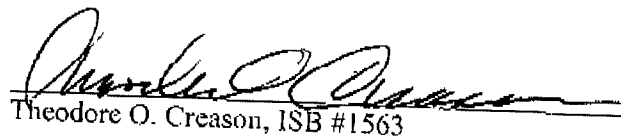


Theodore O. Creason, ISB #1563  
Attorneys for Personal Representative

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 15<sup>th</sup> day of May, 2013, I filed the foregoing MOTION TO STAY PROCEEDING with the Clerk of the Court, and hand-delivered a paper copy to the following persons:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501



Theodore O. Creason, ISB #1563



**Karin Seubert**  
**JONES, BROWER & CALLERY, P.L.L.C.**  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

Case No. CV 2012-00277

**OBJECTION TO MOTION TO  
 STAY PROCEEDINGS**

COMES NOW Respondent Toni Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and objects to the *Motion to Stay Proceedings* dated May 15, 2013 and filed by Petitioner Kareen Cornell, Personal Representative of the Estate of John H. Cornell, deceased. Said *Motion to Stay Proceedings* is set for hearing on Friday, May 17, 2013 at 2:30 p.m.

Movant Kareen Cornell states the basis of her Motion as follows:

Movant has filed a Petition under Idaho's Trust and Estate Dispute Resolution Act (Idaho Code §§ 15-8-101 *et seq.* in district court seeking consolidation of this matter with Case No. CV 2012-439 (*In the Matter of the Estate of John Henry Cornell*) and the appeal of Margaret Watkins in this case, currently pending before the district court. Movant requests this Court stay this proceeding until such time as the district court either assumes jurisdiction over the case under the TEDRA petition or denies the petition for consolidation.

*Motion to Stay Proceedings* at 1. For the Court's convenience, a copy of the referenced "new" Petition is attached hereto as Exhibit A (exhibits A and B are omitted in the interest of judicial

OBJECTION TO MOTION  
 TO STAY PROCEEDINGS

economy as they are identical to Exhibits A and B to the Petition filed by Kareen Cornell on February 26, 2013 and already on file in this proceeding).

Movant's request is puzzling as her Petition filed in this action filed on February 26, 2013 is also brought under the Idaho Trust and Estate Dispute Resolution Act, Idaho Code §§ 15-15-8-101 through 15-8-305. See *Petition for Supervised Administration and Court Ordered Distribution* filed February 26, 2013 at ¶ 2.1. Further, a review of the two Petitions filed by Mrs. Cornell reflects that they are nearly identical through paragraphs 3.8 and 3.10 respectively (the paragraph referencing the death of John Cornell on August 20, 2012). The Petition in the "new" district court TEDRA action proceeds from that point to set forth the procedural history of this case and the probate of John H. Cornell, deceased (Clearwater County Case No. CV 2012-439). The Petition previously filed by Mrs. Cornell in this action proceed from that point to set forth her allegations of Respondent's misconduct in the administration of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell and also sets forth the procedural history of this case through the date of said Petition. The "new" TEDRA action appears at this juncture to be a clear violation of the doctrine of claim preclusion, which protects litigants from litigating an identical issue with the same party or its privy. See *Wernecke v. St. Maries Joint School Dist.* #401, 147 Idaho 277, 288, 207 P.3d 1008, 1019 (2009) (citing *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007)).

Further, Mrs. Cornell's "new" TEDRA action seeks the consolidation of this action with the probate action into the "new" TEDRA action. Respondent is aware of no good reason to further complicate this matter by what she considers to be a fourth action (the first being the action originally filed by John Cornell during his lifetime and now on appeal to district court; the second being the probate of John Cornell's estate; the third being the Petition filed by Mrs. Cornell in this action on February 26, 2013 and the subject of Respondent's *Motion to Dismiss* that is set for hearing on June 4, 2013; and the fourth being the "new" TEDRA action). Even if the judicial economy alone were good cause for some degree of consolidation, Mrs. Cornell has not withdrawn her *Motion for Consolidation* filed in this action on February 26, 2013, which seeks the consolidation of this action with the probate action pursuant to I.R.C.P. 42(a) on the grounds that "consolidation would expedite the Court's business and further the interests of the litigants." *Motion for Consolidation* at 1 (citing *Branom v. Smith Frozen Foods of Idaho, Inc.*, 83 Idaho 502,

OBJECTION TO MOTION  
TO STAY PROCEEDINGS

509, 365 P.d 985, 961 (1961)). Mrs. Cornell has never set said *Motion for Consolidation* for hearing or otherwise pursued it, and her *Motion to Stay Proceedings* gives no good cause why she now instead seeks to consolidate this action into the "new" TEDRA case and why the district court should now assume jurisdiction where the Honorable Randall W. Robinson of the magistrate's division has already presided over this matter, and the probate of John H. Cornell, deceased, for many months, has issued multiple substantive opinions, and is familiar with the case.

Respondent is opposed to the consolidation of this Trust action into a probate action, or both into the "new" TEDRA action, except for the limited purpose of resolving common questions of law or fact, such as the essential question now pending before this Court through Respondent's *Motion to Dismiss* set for hearing on June 4, 2013: do the claims of John Cornell or his Estate related to the administration of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell survive his death? This Court has already addresses that question once through its *Memorandum Opinion and Judgment for Dismissal* entered on February 15, 2013. This Court expressly gave Mrs. Cornell 20 days from its February 2012 decision to file a Petition asserting any additional claims, which it has done. No good cause has been shown why this proceeding should be stayed due to her filing of a duplicative lawsuit in district court.

Mrs. Cornell's *Motion to Stay Proceedings* did not reference what authority her request relies upon, so Respondent can only make the following assumptions as to her true intent:

If Mrs. Cornell's true intent was to consolidate matters, then the proper remedy would have been to pursue her previously filed *Motion for Consolidation* pursuant to I.R.C.P. 42(a). No good cause for consolidation has been shown, however, because this proceeding concerns administration of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell, and specifically whether John Cornell's death extinguishes any potential claim he or his Estate may have related to said Trust. In comparison, the probate action concerning the Estate of John Cornell concerns the determination of whether the will on file with the Court is valid, the determination of his heirs and creditors, inventory of his estate (which would include any interest that his Estate may have in the above Trust, but also any other assets or encumbrances of the Estate), and distribution of said assets accordingly. The only potential common question of law or fact is whether the Estate has any valid (meaning not extinguished by Mr. Cornell's death) claim in the Trust, which is the subject of the June 4, 2013 hearing. In determining whether consolidation is appropriate, it is important to note

OBJECTION TO MOTION  
TO STAY PROCEEDINGS

that I.R.C.P. 42(a) specifically authorizes the court to make such orders concerning proceedings as "may tend to avoid unnecessary costs or delay." A stay in this proceeding would not avoid delay, instead it would compound the long sought resolution of this matter. Further, while the timing of the *Motion to Stay Proceedings* is such that, if granted, Mrs. Cornell would avoid the cost of preparing her response brief to the pending *Motion to Dismiss*, which is due on May 21, 2013. However, the Court should also consider the unnecessary costs to Respondent: Respondent has now borne the cost of active and continuous litigation over the issue of whether her brother's claims survive his death since August 2012. She has previously presented to the Court a *Memorandum of Costs and Attorney Fees* indicating that her costs and attorney fees related to the "first" action alone totaled \$6,488.50 as of March 1, 2013. She has additionally borne the cost of participating in the probate action, pursuing a *Motion to Dismiss* concerning Mrs. Cornell's Petition in this action (including preparation of the supportive brief filed on May 7, 2013), responding to formal discovery and appearing for her deposition, and defending the appeal filed by Margaret Watkins despite Margaret Watkins's appointment as temporary personal representative having been terminated before the decision under appeal had been issued. I.R.C.P. 1(a) establishes that the civil rules are to "be liberally construed to secure the just, speedy and inexpensive determination of every action and proceeding." For these reasons, if Mrs. Cornell's true intent with her *Motion to Stay Proceedings* and "new" TEDRA action were to consolidate matters, the resultant delay and procedural complication is contrary to the just, speedy and inexpensive determination of this proceeding, and should be denied.

If Mrs. Cornell's true intent was to make additional allegations that were not included in her first Petition, then the proper remedy would have been to seek leave of this Court to amend her Petition pursuant to I.R.C.P. 15(a). However, because the "new" TEDRA petition merely restates the procedural history of this case and the probate case, no good cause for amendment or for further delay to allow amendment has been shown, particularly where this Court has allowed discovery to proceed over Respondent's objections, which discovery has since included responses to interrogatories and requests for production of documents, and Respondent's deposition.

If Mrs. Cornell's true intent was to transfer this matter from the magistrate division of district court to district court, then the property remedy would have been to request a transfer pursuant to I.R.C.P. 8(a)(2). However, it is well settled under Idaho law that "proceedings in the

OBJECTION TO MOTION  
TO STAY PROCEEDINGS

probate of wills and administration of estates of decedents, minors and incompetents" be assigned to magistrate court. I.C. § 1-2208. The probate of John H. Cornell, deceased (Clearwater County Case No. CV 2012-439) clearly falls within these categories. The only reasonable conclusion that can be drawn from a review of the Trust and Estate Dispute and Resolution Act, which grants the power and authority to administer and settle "(a) all matters concerning the estates and assets of incapacitated, missing, and deceased persons, including matters involving nonprobate assets and powers of attorney, in accordance with this chapter; and (b) all trusts and trust matters[.]" is that actions brought under TEDRA also fall within the "administration of estates" that are categorically assigned to the magistrate's division. For these reasons, no good cause for transfer of this proceeding to district court has been shown.

If Mrs. Cornell's true intent was to seek a stay pursuant to I.R.C.P. 83(i) due to the pending appeal filed and pursued by Margaret Watkins, it would be inappropriate to grant such a stay to Mrs. Cornell where she did not file a cross appeal pursuant to I.R.C.P. 83(g) within the time allowed to either join in or supplement Margaret Watkins' appeal. Because Mrs. Cornell, as personal representative, took no such action during the time allowed, no good cause has been shown why this Court should not proceed to determine whether to dismiss Mrs. Cornell's Petition filed February 26, 2013. The clear language of this Court in its *Judgment for Dismissal* was that "Kareen Cornell, the personal representative for John Cornell's estate shall be given twenty days to set forth in the above entitled action the claims of the estate[,] in its corresponding *Memorandum Order* that "Kareen shall be given twenty days to substitute for John and present issues free of the pleadings filed by John's attorney during John's lifetime." The only reasonable reading of said statements is that Mrs. Cornell was granted express authority to present issues not addressed by the Court in said ruling. For the reasons discussed in further detail in Respondent's *Memorandum of Law in Support of Second Motion to Dismiss*, Mrs. Cornell has failed to present a claim that does not fall within the Court's earlier ruling and survives the death of John H. Cornell. If Mrs. Cornell disputes this, then she has the opportunity to submit briefing in opposition to the pending *Motion to Dismiss* on or before May 21, 2013.

If Mrs. Cornell's true intent was to relitigate the issues previously determined through this Court's *Memorandum Opinion* and *Judgment for Dismissal*, then the appropriate remedy would have been for Mrs. Cornell, as personal representative, to file a notice of appeal or notice of cross

OBJECTION TO MOTION  
TO STAY PROCEEDINGS

appeal under I.R.C.P. 83 within the time allowed. The relevant time period, which is jurisdictional, has now expired and the record reflects Mrs. Cornell has elected not to file an appeal. Mrs. Cornell and the Estate can certainly participate in the appeal filed by Margaret Watkins, but will also be bound by the decision of the district court, just as it is currently bound by the prior decision of this court pending the outcome of said appeal. It is Respondent's position, as will be further elaborated upon in Respondent's response brief in the appeal, that this Court's decision should be affirmed as being supported by Idaho law, and also because appellant Margaret Watkins lacks standing to appeal the *Judgment for Dismissal*. It is the district court's role to consider the appeal. That does not deprive this Court from authority to determine whether Mrs. Cornell's opinion of February 26, 2013 should be dismissed or not.

For these reasons, Respondent Toni Johnson respectfully requests that this Court deny Mrs. Cornell's *Motion to Stay Proceedings*.

DATED this 17th day of May, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *OBJECTION TO MOTION TO STAY PROCEEDINGS* was, this 17th day of May, 2013, transmitted via facsimile to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
Lewiston, ID 83501

By: Karin Seubert  
OBJECTION TO MOTION  
TO STAY PROCEEDINGS

Theodore O. Creason, ISB #1563  
 Samuel T. Creason ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Petitioner

COPY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE ESTATE OF JOHN H. CORNELL,

and

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

)  
 ) Case No. CV  
 )  
 ) AMENDED PETITION  
 ) FOR CONSOLIDATION AND  
 ) ADMINISTRATION OF THE ESTATE OF  
 ) JOHN H. CORNELL AND THE  
 ) REVOCABLE FAMILY TRUST OF  
 ) MICHAEL S. CORNELL AND ARLIE M.  
 ) CORNELL  
 )  
 )  
 ) I.C. §§ 15-8-101 through 15-8-305

COMES NOW Kareen Cornell, in her capacity as Personal Representative of the Estate of John H. Cornell (hereinafter "Petitioner") by and through her attorney of record, Theodore O. Creason of Creason, Moore, Dokken & Geidl, PLLC, and hereby alleges as follows:

**I. PARTIES**

1.1. Petitioner is the personal representative of the Estate of John H. Cornell and surviving spouse of John Henry Cornell and a resident of Minidoka County, Idaho.

TEDRA PETITION - 1

Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston, ID 83501  
 (208) 743-1516; Fax: (208) 746-2231

Exhibit A



1.2. The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell (hereafter "the Trust") was formed and has been administered in the State of Idaho; an action regarding the proper administration of the Trust is before the magistrate division of the District Court of Clearwater County, Case No. CV 2012-277 (hereinafter, "the Trust Case").

1.3. A Petition for Formal Probate of the Estate of John H. Cornell (hereafter "the Estate") is before the magistrate division of the District Court of Clearwater County, Case No. CV 2012-439 (hereinafter, "the Estate Case").

## II. JURISDICTION

2.1. This Court has jurisdiction over this matter and the parties thereto pursuant to the Idaho Trust and Estate Dispute Resolution Act, Idaho Code §§ 15-8-101 through 15-8-305.

2.2. This Court is the proper venue for administration of the Estate pursuant to Idaho Code § 15-3-201.

2.3. This Court is the proper venue for administration of the Trust pursuant to Idaho Code § 15-7-202.

## III. FACTS

3.1. Michael S. Cornell and Arlie M. Cornell created the Trust on November 1, 1996, a copy of the Trust document is attached hereto as Exhibit A.

3.2. John H. Cornell held an interest in the Trust upon the death of Michael S. Cornell and Arlie M. Cornell.

3.3. John H. Cornell his sole and separate real property into the Trust in the form of Quit Claim Deed on or about January 3, 2007.

3.4. Arlie M. Cornell died on November 9, 2008.

3.5. On August 6, 2009, Michael S. Cornell amended the terms of the Trust from having John H. Cornell and Toni C. Cornell serve as co-trustees of the Trust upon his death, to designating Toni C. Cornell as the sole trustee upon his death, a copy of the amendment is attached hereto as Exhibit B.

3.6. Michael S. Cornell died on December 15, 2009.

3.7. John Henry Cornell instituted the Trust Case on July 11, 2012 by filing a Petition for Supervised Administration and Removal of Trustee.

3.8. John Henry Cornell died on August 20, 2012.

3.9. Petitioner is the surviving spouse of John Henry Cornell.

3.10. Margaret Watkins, John Henry Cornell's aunt, instituted the Estate Case by filing a Petition for Formal Probate of the Estate on November 13, 2012.

3.11. In her petition, Watkins sought appointment as Personal Representative of the Estate. Watkins offered a document for probate she alleges is the will of John H. Cornell. Petitioner challenges the validity and authenticity of the document offered by Watkins. Petitioner alleges John H. Cornell died intestate.

3.12. On September 17, 2012, Toni C. Johnson, in her capacity as trustee of the Trust, filed a motion to dismiss the Trust action on the grounds that because John Henry Cornell died before distribution of the Trust, the entirety of the Trust res vested in Toni C. Johnson.

3.13. Petitioner filed an objection to the Watkins' petition on November 27, 2012, on the grounds that Petitioner held priority to serve as personal representative in formal testacy or administrator in intestacy.

3.14. On February 12, 2013, the magistrate court appointed Petitioner to serve as Personal Representative in the Estate Case.

3.15. On February 15, 2013, the magistrate court issued a memorandum opinion dismissing John Cornell's claims in the Trust Case on the grounds that the causes of action did not survive his death. The court expressly provided Petitioner twenty (20) days in which to file claims on behalf of the Estate in that case.

3.16. Pursuant to the February 15 order, Petitioner filed a petition in the Trust Case on February 26, 2013.

3.17. Watkins filed an appeal of the Court's February 15 Order on April 2, 2013. Watkins' appeal is currently pending before this Court.

3.18. Cornell filed a motion to dismiss Petitioner's petition on May 7, 2013.

#### **PRAYER FOR RELIEF**

Wherefore, Petitioner prays as follows:

1. That the Court consolidate the Trust Case and the Estate Case with this TEDRA action pursuant to Idaho Code § 15-8-202(3).
2. That the Court remove Toni C. Johnson as Trustee of the Trust.
3. That the Court appoint Petitioner, in her capacity as Personal Representative of the Estate, as Trustee of the Trust.
4. That the Court order the Trust be subject to supervised administration.
5. That Petitioner be awarded reasonable attorneys fees for those fees personally incurred in pursuit of this action.

6. That petitioner be awarded such other and further relief as the Court may deem just and equitable.

DATED this 16th day of May, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC.

A handwritten signature in dark ink, appearing to read "Theodore O. Creason", is written over a horizontal line.

Theodore O. Creason, ISB #1563


Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

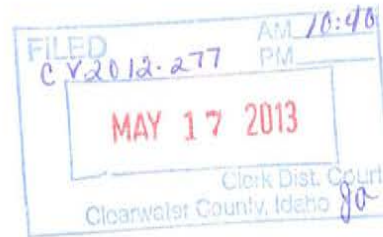
I HEREBY CERTIFY that on this 16th day of May, 2013, I filed the foregoing PETITION FOR CONSOLIDATION AND ADMINISTRATION OF THE ESTATE OF JOHN H. CORNELL AND THE RECOVERABLE FAMILY TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL with the Clerk of the Court, and provided a paper copy to the following persons:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501  
(via Valley Messenger)

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501  
(via Valley Messenger)

  
Theodore O. Creason, ISB #1563

Karin Seubert  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

Case No. CV 2012-00277

**MOTION TO AUGMENT RECORD**

COMES NOW Appellee Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and moves this Court pursuant to I.R.C.P. 83(q) and I.A.R. 30, hereby moves this honorable Court for an order augmenting the clerk's record to add the following documents from the collateral matter *In the Matter of the Estate of John H. Cornell, deceased*, Clearwater County Case No. CV 2012-00439:

1. Order of Appointment of Temporary Personal Representative entered November 15, 2012 (certified copy attached hereto as Exhibit A);
2. Order Appointing Personal Representative entered February 12, 2013 (certified copy attached hereto as Exhibit B); and
3. Registry of Action as of May 7, 2013 (copy attached hereto as Exhibit C).

The specific grounds for the request are that said documents are necessary in order to allow the District Court to be fully advised when determining whether Appellant Margaret Watkins has

MOTION TO AUGMENT RECORD

-1-

standing to pursue her appeal.

DATED this 17 day of May, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MOTION TO AUGMENT RECORD* was, this 17 day of May, 2013,

☐ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
☒ by first class mail; or  
☐ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

MOTION TO AUGMENT RECORD

-2-



CV 2012-439

NOV 15 2012

11:17

ja

AHERIN, RICE & ANEGON  
 Darrel W. Aherin  
 1212 Idaho Street  
 P.O. Drawer 698  
 Lewiston, ID 83501-0698  
 (208) 746-3646  
 ISB# 1534

Attorneys for Petitioner

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF THE ESTATE OF  
 JOHN HENRY CORNELL,  
 Deceased.

NO. CV 2012-439

ORDER OF APPOINTMENT OF  
 TEMPORARY PERSONAL  
 REPRESENTATIVE

Upon consideration of the Petition for Appointment of Temporary Personal Representative for the Estate of John Henry Cornell, deceased, filed by Darrel W. Aherin, attorney for petitioner, Margaret Watkins, and the Court being fully apprised of the matter, the Court finds:

1. The petitioner, Margaret Watkins, is qualified to be appointed temporary personal representative of the Estate of John Henry Cornell;
2. That venue is proper;
3. That the best interest of the Estate of John Henry Cornell will be served by the appointment of Margaret Watkins as temporary personal representative;

THEREFORE, Margaret Watkins is hereby appointed temporary personal representative of the Estate of John Henry Cornell pending the hearing on the Petition for Formal Probate of Will and Formal Appointment of Personal Representative, or sixty (60) days, whichever occurs last.

ORDER OF APPOINTMENT OF TEMPORARY  
 PERSONAL REPRESENTATIVE -- 1

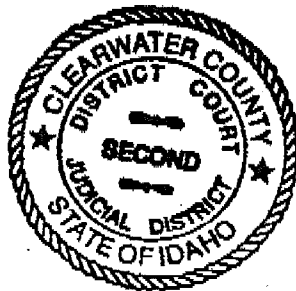
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Aherin, Rice & Anegon  
 Attorneys at Law  
 Lewiston, Idaho

Exhibit A

DATED this 15th day of November, 2012.

Randall W. Palmer  
JUDGE



STATE OF IDAHO  
County of Clearwater

I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now remains on file and of record in my office. WITNESS my hand and official seal hereto affixed.

this 11th day of May A.D. 2013  
CARRIE BIRD, CLERK OF THE DISTRICT  
COURT EX OFFICIO AUDITOR & RECORDER

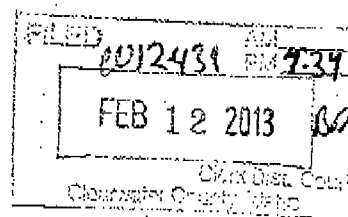
By Deputy [Signature]

ORDER OF APPOINTMENT OF TEMPORARY  
PERSONAL REPRESENTATIVE -- 2

N:\Comell, Estate of John H\Pleadings\Order of Temporary Appointment.docx -scr

Aherin, Rice & Anegon  
Attorneys at Law  
Lewiston, Idaho

Theodore O. Creason, ISB #1563  
 Samuel T. Creason, ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorney for Surviving Spouse  
 Of John Henry Cornell



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

<p>IN THE MATTER OF THE ESTATE</p> <p>OF</p> <p>JOHN HENRY CORNELL,</p> <p>Deceased.</p>	<p>Case No. CV 2012-439</p> <p>ORDER APPOINTMENTING          PERSONAL REPRESENTATIVE</p>
--	--

The petitioner Kareen Cornell for an adjudication of intestacy and determination of heirs having come before the Court, the Court makes the following findings:

1. John Cornell died on August 20, 2012, at the age of 47 years. At the time of his death, the decedent was domiciled in Minidoka County, State of Idaho.

ORDER APPOINTMENTINT  
 PERSONAL REPRESENTATIVE -- 1

Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston ID 83501  
 (208)743-1516; Fax(208)746-2231

Exhibit B

2. No adjudication has been made of whether Decedent died intestate. No Will has been admitted to probate.

3 The decedent was survived by the following persons:

<u>Name</u>	<u>Address</u>	<u>Relationship</u>
Kareen Cornell	P. O. Box 361 Heyburn, Idaho 83336	Spouse

4. Movant's Petition sets forth her priority as surviving spouse to appointment as personal representative of the Estate.

WHEREFORE, PETITIONER REQUESTS that the Court issue an order appointing Kareen Cornell Personal Representative of the Estate of John Cornell and terminating the appointment of acting temporary personal representative, Margaret Watkins.

DATED this 22 day of February, 2013.

*Ramchell W. Polman*

Judge

STATE OF IDAHO  
County of Clearwater  
I hereby certify that the foregoing is a true and correct copy of an instrument as the same now remains on file and of record in my office. WITNESS my hand and official seal hereto affixed.  
this 14th day of May A.D. 2013.  
CARRIE BIRD, CLERK OF THE DISTRICT COURT EX-OFFICIO AUDITOR & RECORDER  
By Deputy *[Signature]*

ORDER APPOINTMENT  
PERSONAL REPRESENTATIVE - 2

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston ID 83501  
(208)743-1516; Fax(208)746-2231

Date: 5/14/2013

## Second Judicial District Court - Clearwater County

User: JJENSEN

Time: 11:57 AM

## ROA Report

Page 1 of 3

Case: CV-2012-0000439 Current Judge: Randall W. Robinson  
 In The Matter Of The Estate Of John Henry Cornell Deceased

In The Matter Of The Estate Of John Henry Cornell Deceased

Date	Code	User	Judge
11/13/2012	NCFE	JALLAIN	New Case Filed - Formal Estate
		JALLAIN	Filing: A5 - Petition for formal probate Paid by: Aherin, Rice & Anegon Receipt number: 0003570 Dated: 11/13/2012 Amount: \$96.00 (Cashiers Check) For: Watkins, Margaret (other party)
	APER	JALLAIN	Other party: Watkins, Margaret Appearance Darrel W. Aherin
	PETN	JALLAIN	Petition for Formal Probate of Will and Formal Appointment of Personal Representative (Idaho Code 15-3-402)
	AFFD	JALLAIN	Affidavit of Attesting Witness of Margaret Watkins
	AFFD	JALLAIN	Affidavit of Attesting Witness of Lillian D Beckman
	ACAP	JALLAIN	Acceptance Of Appointment - Margaret Watkins
	PETN	JALLAIN	Petition for Appointment of Temporary Personal Representative
	ACAP	JALLAIN	Acceptance Of Appointment as Temporary Personal Representative
		JALLAIN	Miscellaneous Payment: For Certifying The Same Additional Fee For Certificate And Seal Paid by: Aherin, Rice & Anegon Receipt number: 0003571 Dated: 11/13/2012 Amount: \$4.00 (Cashiers Check)
11/15/2012	NOTC	JALLAIN	Notice of Petition and Hearing (IC 15-1-401)
	HRSC	JALLAIN	Hearing Scheduled (Formal Probate-App't of Personal Representative 11/27/2012 12:30 PM)
	ORDR	JALLAIN	Order of Appointment of Temporary Personal Representative
	MISC	JALLAIN	Temporary Letter - Temporary appointment of Margaret Watkins as Temporary Personal Rep
11/20/2012	NOTC	BARBIE	Corrected Notice of Petition and Hearing
11/27/2012		JALLAIN	Filing: J1b- Probate, Demand for notice Paid by: Karin Seubert Receipt number: 0003701 Dated: 11/27/2012 Amount: \$9.00 (Cashiers Check) For: Watkins, Margaret (other party)
		JALLAIN	Filing: I1 - Initial Appearance by persons other than the plaintiff or petitioner Paid by: Creason Moore Dokken & Geidl, PLLC Receipt number: 0003702 Dated: 11/27/2012 Amount: \$66.00 (Cashiers Check) For: Cornell, John Henry (subject)
	DENO	JALLAIN	Demand For Notice
	NOTC	JALLAIN	Notice of Appearance - Theodore O Creason
	OBJC	JALLAIN	Objection to Petition for Formal Probate of Will and Formal Appointment of Personal Representative

Exhibit C

Date: 5/14/2013

## Second Judicial District Court - Clearwater County

User: JJENSEN

Time: 11:57 AM

## ROA Report

Page 2 of 3

Case: CV-2012-0000439 Current Judge: Randall W. Robinson  
 In The Matter Of The Estate Of John Henry Cornell Deceased

In The Matter Of The Estate Of John Henry Cornell Deceased

Date	Code	User		Judge
11/27/2012	CONT	KBROWNING	Hearing result for Formal Probate- Appt of Personal Representative scheduled on 11/27/2012 12:30 PM: Continued	Randall W. Robinson
	HRSC	KBROWNING	Hearing Scheduled (Status Conference 12/26/2012 08:30 AM)	Randall W. Robinson
	APER	KBROWNING	Other party: Cornell, Toni Appearance Karin Seubert	Randall W. Robinson
	APER	KBROWNING	Other party: Cornell, Kareen Appearance Theodore O. Creason	Randall W. Robinson
		KBROWNING	Notice Of Hearing	Randall W. Robinson
	CMIN	KBROWNING	Court Minutes	Randall W. Robinson
12/19/2012	PETN	JALLAIN	Petition for Formal Adjudication of Intestacy and Formal Appointment of Personal Representative	Randall W. Robinson
	MOTN	JALLAIN	Motion for Order Restraining Acting Personal Representative (IC15-3-401)	Randall W. Robinson
	MEMO	JALLAIN	Memorandum in Support Re: Petition for Formal Adjudication of Intestacy and Formal Appointment of Personal Representative	Randall W. Robinson
12/26/2012	HRHD	JALLAIN	Hearing result for Status Conference scheduled on 12/26/2012 08:30 AM: Hearing Held- Off Record	Randall W. Robinson
12/27/2012	HRSC	JALLAIN	Hearing Scheduled (Court Trial 02/06/2013 02:00 PM - 5:00 PM)	Randall W. Robinson
		JALLAIN	Notice Of Hearing for Court Trial	Randall W. Robinson
1/18/2013	LETT	JALLAIN	Amended Temporary Letters	Randall W. Robinson
2/4/2013	MOTN	BARBIE	Motion To Mediate	Randall W. Robinson
2/6/2013	HRHD	JALLAIN	Hearing result for Court Trial scheduled on 02/06/2013 02:00 PM: Hearing Held - issue to be addressed at another hearing	Randall W. Robinson
2/12/2013	ORDR	BARBIE	Order Appointing Personal Representative	Randall W. Robinson
	LTRA	BARBIE	Letters of Administration	Randall W. Robinson
2/13/2013	OBJC	JALLAIN	Objection to Proposed Order Appointing Personal Representative	Randall W. Robinson
2/22/2013	HRSC	JALLAIN	Hearing Scheduled (Objection 02/26/2013 11:00 AM)	Randall W. Robinson
		JALLAIN	Notice Of Hearing	Randall W. Robinson
2/26/2013	HRHD	JALLAIN	Hearing result for Objection scheduled on 02/26/2013 11:00 AM: Hearing Held	Randall W. Robinson

Date: 5/14/2013

## Second Judicial District Court - Clearwater County

User: JJENSEN

Time: 11:57 AM

ROA Report

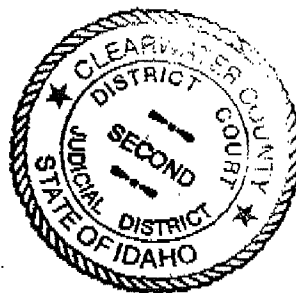
Page 3 of 3

Case: CV-2012-0000439 Current Judge: Randall W. Robinson

In The Matter Of The Estate Of John Henry Cornell Deceased

In The Matter Of The Estate Of John Henry Cornell Deceased

Date	Code	User	Judge
2/26/2013	CMIN	JALLAIN	Randall W. Robinson
			Court Minutes Hearing type: Objection Hearing date: 2/26/2013 Time: 11:12 am Courtroom: Court reporter: None Minutes Clerk: Jodie E. Allain Tape Number: Ted Creason Sam Creason Karin Seubert Darrel Aherin - telephonically
	LTST	JALLAIN	Randall W. Robinson
5/6/2013	NOCR	JALLAIN	Randall W. Robinson
			Letters Of Testamentary Probate Notice To Creditors

STATE OF IDAHO  
County of ClearwaterI hereby certify that the foregoing is a full, true  
and correct copy of an instrument as the same  
now remains on file and of record in my office.  
WITNESS my hand and official seal hereto affixed.this 14th day of May, A.D. 2013  
CARRIE BIRD, CLERK OF THE DISTRICT  
COURT EX-OFFICIO AUDITOR & RECORDERBy Deputy [Signature]



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

COURT MINUTES

CV-2012-0000277

The Matter of Michael S Cornell

Hearing type: Motion to Stay Proceedings

Hearing type: Motion Hearing

Hearing date: 05/17/2013

Time: 2:35 PM – 2:57 PM, 4:00 PM – 4:14 PM

Judge: Randall W. Robinson

Courtroom: 001

Court reporter: None

Minutes Clerk: Jodie

Tape Number: CD563-1

The Honorable Randall W. Robinson presiding.

Present in Court:

Samuel Creason, Karin Seubert,

- 2:35 Court – introduces all present. Explains Request for today's hearing, Motion for Stay of Proceedings; Appeal – does not feel that Mr. Aherin has the 54B Certification needed to Appeal.
- 2:37 Mr. Creason – explains reason to proceed with the TEDRA for Judge Griffin to review
- 2:38 Court – explains the Idaho State Rule 1-2208 which provides the Magistrate to handle Estate Matters.
- 2:42 Mr. Creason – hopes to resolve all in one court with one Judge

- 2:43 Court – explains reason for leaving this case in Magistrate Court Idaho State Rule 1-2208 (2)
- 2:45 Ms. Seubert - Respectfully disagrees with Mr. Creason's reason for moving this case to District Court. This is a classic case always assigned to Magistrate Court.  
Time for Appeal is passed  
Should consider taking care of all issues that have not been dealt with  
Feels her client deserves some answers  
Has filed an Objections Brief
- 2:48 Mr. Creason - does not have Brief in front of him  
Requesting a Break to review the Brief that was faxed to his office this morning  
Concerns about proper procedures for continuing
- 2:50 Court – Clarifies issues
- 2:51 Colloquy between Court and Counsel regarding clarifying the issues, Personal Representative and Appeal
- 2:56 Court – Recess for Mr. Creason to review paperwork, will resume at 4:00 PM today
- 4:00 Court – Resumes
- Mr. Creason – Apologizes for the Delay and gives reasons for:  
TEDRA is to Consolidate  
Appeal is in District Court  
Address the Estate/Trust? Dismissal?  
If Consolidated:  
Grant Petition to Consolidate by District?  
Stay in Magistrate Court – issues from Claims before John Cornell's death  
New issues have come up and go to Appeal?
- 4:05 Colloquy between Court and Counsel regarding issues brought up by Mr. Creason
- 4:11 Court – Denies Motion for the Stay
- 4:13 Ms. Seubert – confirms schedule for June 4, 2013  
3:00 PM with Hearing with District Court  
4:00 PM Motion to Dismiss with Judge Robinson
- 4:14 Recess

**Karin Seubert**  
**JONES, BROWER & CALLERY, P.L.L.C.**  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

Case No. CV 2012-00277

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

**NOTICE OF HEARING**

YOU WILL PLEASE TAKE NOTICE that KARIN R. SEUBERT of the firm of JONES, BROWER & CALLERY, P.L.L.C., attorney of record for the Appellee, Toni Johnson, gives notice that she will call on for hearing the undersigned's Motion to Augment Record, the 4<sup>th</sup> day of June, 2013, at the hour of 3:00 p.m. or as soon thereafter as counsel may be heard in the Courtroom of the District Court at Clearwater County Courthouse, Orofino, Idaho, Honorable Michael Griffin presiding.

DATED this 17 day of May, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
 KARIN R. SEUBERT  
 Attorney for Toni Johnson

NOTICE OF HEARING

-1-

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was, this 17 day of May, 2013,

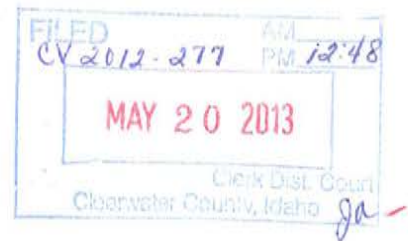
\_\_\_\_\_ hand-delivered by providing a  
\_\_\_\_\_ copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
\_\_\_\_\_ mailed, postage pre-paid,  
\_\_\_\_\_ by first class mail; or  
☒ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF )

THE REVOCABLE FAMILY )  
TRUST OF MICHAEL S. CORNELL )  
AN ARLIE M. CORNELL )

Defendant. )  
\_\_\_\_\_ )


CASE NO. CV 2012-277

ORDER

Oral argument was heard on May 17, 2013 on the Motion of Kareen Cornell to Stay Proceeding with Samuel Creason representing Kareen Cornell, Petitioner and Personal Representative of the Estate of John Henry Cornell, and Karin Seubert representing the Respondent, Toni Johnson. After considering the Motion, the oral argument, and the file,

Kareen Cornell's Motion to Stay the Proceedings IS HEREBY DENIED on the basis that this Court has original jurisdiction of the action to the exclusion of any other actions that have subsequently been filed to the above entitled action and for such additional reasons as set forth on the record.

Dated this 20th day of May, 2013.

  
\_\_\_\_\_  
Randall W Robinson, Magistrate Judge



## CERTIFICATE OF MAILING

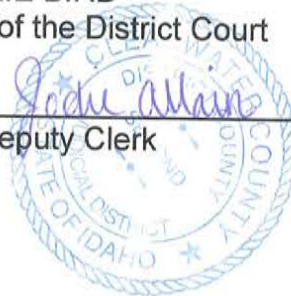
I hereby certify that a true and correct copy of the foregoing Order was mailed, postage pre-paid, or delivered on the 20<sup>th</sup> day of May, 2013, to:

Samuel Creason  
Creason, Moore, Dokken & Geidl, PLLC  
P.O. Box 698  
Lewiston, ID 83501

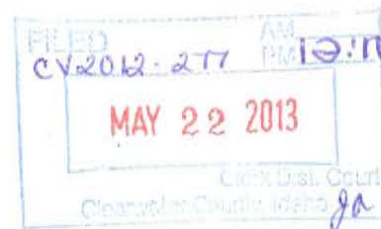
Karin Seubert  
Jones, Brower & Callery, PLLC  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By:   
Deputy Clerk



Theodore O. Creason, ISB #1563  
 Samuel T. Creason ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Personal Representative  
 Of Estate of John Henry Cornell



**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:	)	Case No. CV 2012-00277
	)	
THE REVOCABLE FAMILY TRUST OF	)	<b>AFFIDAVIT OF THEODORE O.</b>
MICHAEL S. CORNELL AND ARLIE M.	)	<b>CREASON CERTIFYING A PORTION</b>
CORNELL.	)	<b>OF THE DEPOSITION OF TONI C.</b>
	)	<b>JOHNSON AND EXHIBITS OF APRIL</b>
	)	<b>22, 2013</b>

STATE OF IDAHO                    )  
   ) ss  
 COUNTY OF NEZ PERCE )

THEODORE O. CREASON, comes now, being first duly sworn upon oath deposes and says:

1. That he is the attorney of record for for Kareen Cornell, surviving spouse and Personal Representative of the Estate of John H. Cornell.
2. That on the 22<sup>nd</sup> day of April, 2013, Affiant took the deposition under oath of Toni C. Johnson.

**AFFIDAVIT OF THEODORE O. CREASON CERTIFYING A  
 PORTION OF THE DEPOSITION OF TONI C. JOHNSON AND  
 EXHIBITS OF APRIL 22, 2013 - 1**

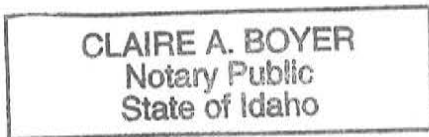
Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston, ID 83501  
 (208) 743-1516; Fax: (208) 746-2231




3. That Exhibits A, B, C, D, and E attached hereto are portions of testimony and exhibits to said deposition.
4. These portions of the deposition transcript and exhibits are provided to the Court in support of the Memorandum in Opposition Re: Motion to Dismiss filed herewith.

  
Theodore O. Creason, ISB#1563

SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day, May, 2013.



(SEAL)

  
Notary Public in and for said State,  
residing at or employed in Lewiston.  
My Commission Expires: 6/10/17

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21<sup>st</sup> day of May, 2013, I filed the foregoing **AFFIDAVIT CERTIFYING A PORTION OF THE DEPOSITION OF TONI C. JOHNSON AND EXHIBITS OF APRIL 22, 2013**, with the Clerk of the Court, and **delivered via first class mail** to the following person:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

  
Theodore O. Creason, ISB #1563

1 Q. Sure.  
2 A. I haven't seen this before.  
3 Q. When did you first become aware that you were  
4 a Trustee of the Revocable Trust of Michael S. Cornell  
5 and Arlie M. Cornell?  
6 A. I can't recall right now.  
7 Q. Were your parents both living at the time  
8 that you became aware of that fact?  
9 A. I can't recall.  
10 Q. Were you present -- this document -- let's  
11 back up just a bit. This document, Exhibit No. 6,  
12 indicates that it was executed on the 6th of August,  
13 2009. At that time your mother was deceased, am I  
14 right?  
15 A. Correct.  
16 Q. Okay, and at that time you were living with  
17 your father, correct?  
18 A. Yes. I was caregiving for him. He was  
19 dying.  
20 Q. Okay, and this document apparently was  
21 notarized by Alison M. Brandt, am I right?  
22 A. Apparently so.  
23 Q. And it purports to make a change to the  
24 Revocable Trust. Do you understand that to be true?  
25 A. Yes, sir.

K & K REPORTING (208)743-1380  
kkreport@wildblue.net

65

1 is Exhibit No. 7.  
2 A. Okay.  
3 Q. Have you ever seen that document before? I  
4 apologize to you, too, because it looks like they  
5 stapled it together with No. 8.  
6 A. Thank you. No problem. I appreciate that.  
7 I have not seen this document before.  
8 Q. Okay. Do you know who Hurd Thornton is?  
9 A. I've never heard of that person.  
10 Q. All right. I'm going to show you -- before  
11 we leave that topic were you aware back in 1996 that  
12 you and your brother John were named as the  
13 Co-Trustees, Co-Successor Trustees of your parents'  
14 Trust?  
15 A. I did not. I did not read it.  
16 Q. Did you know that you were named as a  
17 Co-Trustee with your brother John?  
18 A. Well, I was under the impression that I was  
19 in charge of everything. Something got changed  
20 somewhere along the line, and I don't know anything  
21 more about it.  
22 Q. Okay. I've handed you No. 8 there.  
23 A. Okay.  
24 Q. Have you seen that document before?  
25 A. I have not.

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1 Q. Okay. Were you involved in any discussions  
2 about making a change in the Revocable Trust --  
3 A. (Shakes head negatively.)  
4 Q. -- at that time?  
5 A. No, sir.  
6 Q. When did you first become aware that you were  
7 the Successor Trustee and not Co-Trustee of the Trust?  
8 A. I don't recall the date. All I know is my  
9 brother drove my dad down to Alison Brandt, and they  
10 came back with a paper somewhat similar to this and  
11 showed it to me. That's when I knew, but I don't  
12 recall the date.  
13 Q. That's when you knew what?  
14 A. That I had become the Successor of the  
15 Trustee.  
16 Q. Did you discuss that with John?  
17 A. Not especially.  
18 Q. When you say not especially, I'm not sure  
19 what you mean.  
20 A. I'm trying to be fair here.  
21 Q. I just want you to tell me -- answer the  
22 question. You let somebody else worry about the  
23 fairness.  
24 A. Okay. I don't recall.  
25 Q. Okay, you can give that to her, please. This

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kkreport@wildblue.net

66

1 Q. Has anybody discussed with you, other than  
2 Alison Brandt, what your duties and powers as Trustee,  
3 Co-Trustee, or Successor Trustee for the Cornell  
4 Revocable Trust would be?  
5 A. I can't recall at this time.  
6 Q. Other than Ms. Seubert.  
7 A. Nobody -- well -- I don't recall.  
8 Q. Does Ms. Brandt no longer represent the  
9 Trust?  
10 A. Absolutely not, sir.  
11 Q. Did you terminate her services?  
12 A. I did, sir.  
13 Q. When did you terminate her services?  
14 A. I don't recall, but I did send her a  
15 certified letter, return receipt, that I would no  
16 longer need her. Shortly this was after sometime --  
17 let me rephrase that, please. She kept mucking things  
18 up with my brother's attorney, and at some point I  
19 fired her, and I don't recall exactly when that was.  
20 Q. Was this after your father had died?  
21 A. Yes, sir.  
22 Q. And who was your brother's attorney at that  
23 time?  
24 A. Mr. Aherin.  
25 Q. And then I'm going to hand you Exhibit No. 9.

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kkreport@wildblue.net

68



1 A. Okay.

2 Q. A little earlier in the deposition, Ms.

3 Johnson, you referred to some list that was made out

4 that had something to do with items of property in the

5 Trust. Is this the list you were referring to?

6 A. Yes, sir, it is.

7 Q. Okay. Whose handwriting is that?

8 A. In parts it's mine, in parts it is my

9 brother's.

10 Q. And when you say parts of it are your

11 brother's you are talking about John?

12 A. Yes, that is correct.

13 Q. Okay. Tell me, if you would, please, which

14 entrees are his and which are yours.

15 A. Okay, to make this extremely clear, I wrote

16 down on the top items John wants and No. 1 was table

17 with basically antique gold claws. Then he initialed

18 it. That's what he wanted. The second was a matching

19 desk, and he initialed that's what he wanted. There

20 was one China closet that belonged to the Trust and one

21 that belonged to me. I recall that now. He wanted

22 that when the house sold. And then the next item it

23 says -- my brother wrote this: If bar stoles,

24 s-t-o-l-e-s -- something LA sisters. I'm sorry. I

25 can't read the writing.

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kkreport@wildblue.net

69

1 did he leave them with you or what?

2 A. No, sir. I had come home -- or I can't

3 exactly recall all the circumstances, but we had done

4 the list because we were trying to figure out who

5 wanted what and at that time I came back later and he

6 made a little adjustment, and I didn't say anything.

7 Q. Did he take certain items with him at that

8 time?

9 A. I don't remember exactly the date, but he

10 took an entire car full of stuff with him.

11 Q. Was this at or about the time that you

12 contend that he injured you?

13 A. Yes, sir.

14 Q. So the last time you saw John was somewhere

15 near 2/22/2010; is that right?

16 A. Roughly.

17 Q. Okay. Showing you now Exhibit No. 10. Do

18 you recognize Exhibit No. 10?

19 A. I do, sir.

20 Q. And who wrote that out?

21 A. I did.

22 Q. What is that supposed to be?

23 A. In other words Alison Brandt told me to write

24 down how much the house was for sale at that time. She

25 asked what accounts do you have. I said, trust

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1 Q. Plays, okay.

2 A. Plays, spotting scope. John initialed it,

3 then I initialed it. Okay. Then Toni to retain

4 shotguns. I wrote that. And I wrote, John requested a

5 multitude of electronic equipment; i.e, meters, etc,

6 and then he scratched something out. A lot of

7 equipment and tools, one camping lantern. Underneath

8 my brother wrote: Most there are a set of two. Other

9 stuff unusable by my sister. Prior we initialed that,

10 but he hadn't written that down at that point.

11 Q. So, is that your handwriting, the last line,

12 says hope chest to John?

13 A. Yes, sir, it is.

14 Q. Okay. Now, there is a date at the top. It

15 says 2/22/10?

16 A. Yes, sir.

17 Q. Was that the date that this list was written?

18 A. Yes, sir, between he and I.

19 Q. And who has the original of this list?

20 A. Ms. Seubert does.

21 Q. Okay. You seem to indicate that some entrees

22 or cross-outs or something were made after the time

23 that the list was made. Who made changes to it?

24 A. My brother, John Cornell.

25 Q. And did he send those changes back to you or

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1 account, checking account, credit union, savings, that

2 was in the Wells Fargo. And then I described

3 everything that was in the Trust to the best of my

4 knowledge on these sheets of paper here.

5 Q. So, was that a true and accurate inventory of

6 property that you considered to be in the Trust?

7 A. The very best of my knowledge.

8 Q. On the second to last page at the very bottom

9 there is an entry that says promise to Margaret

10 Watkins.

11 A. Yes.

12 Q. What was promised to Margaret Watkins?

13 A. She asked me at one point, you know, you

14 asked me if I wanted something, and she says, yes, I

15 want the binding machine. So, I agreed to give it to

16 her.

17 Q. Have you done that?

18 A. No, sir. It is still at the house.

19 Q. There's also just above that an entry that I

20 can't quite understand. It says something about

21 antique typewriter John took home. It belonged to

22 Marlene aunt?

23 A. Correct.

24 Q. When did this typewriter get taken home?

25 A. I believe he did that when we did the

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WOULD LIKE

2-22-10

ITEMS JOHN WANTS

1. TABLE, ANTIQUE GOLD CLAWS
2. DESK matching Desk
3. DRESSER
4. CHINA CLOSET DOWNSTAIR, WHEN MY HOUSE IS SOLD
5. KING SIZE BED

OK Rec to J

If Ben Stoles LA Sisters plays

- OK would like
- 6 SPOTTING SCOPE

FOR JOHN

7. Tone to Relain Shotguns

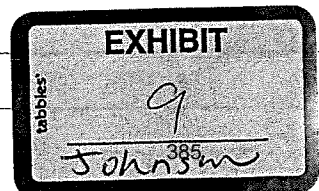
8. John requested a Mulehead of electronic equipment, 16 meters etc.

~~that equipment~~

Most there are a set of two

other stuff unusable by my sister

9. Hape Chest to John



DEC-02-2010 12:19 From:

To: 201 33650

P.5/8

THE HOUSE IS LISTED FOR  
\$445,000.00

TRUST ACCOUNT

CHECKING

CREDIT UNION

SAVINGS

ONE SMALL BED

TWO KING SIZE BEDS

ONE MEDIUM SIZE TELEVISION

ONE LARGE TELEVISION

TWO REFRIGERATORS THE

BLACK ONE IS INCLUDED WITH

THE SALE OF THE HOUSE

ONE PAINTING MADE BY A

FAMILY MEMBER

MAHOGNEY DRESSER

TWO MAHOGNEY DESKS ONE

IN EXTREMELY POOR CONDITION

MAHOGNEY TABLE WITH CLAWS

ON BOTTOM

FOUR COUCHES TWO THAT

ARE WORN OUT

FIVE RECLINER CHAIRS

ONE DEEP FREEZER

HONDA INTERCEPTOR MOTOR-

CYCLE

ONE FISHING POLE

TWO SETS OF PATIO FURNIT-

TURE WITH A

ONE IS WHITE THE OTHER

IS WICKER.

COFFEE TABLE

HAWAIIAN PICTURES THAT

ARE PRINTS, I PURCHASED

THEM FOR MY MOTHER

DEC-02-2010 12:19 From:

To: 63550

P.6/8

TAHITIAN DRUM  
TWO BAR STOOLS  
LAMPS (FOUR)  
TWO CHINA CLOSETS ONE IS  
MINE  
MISC. KITCHEN UTENCILS & PLATES  
TWO SETS OF CHINA PLATES  
JOHN TOOK HOME  
ONE BOX OF SILVERWARE  
FIELD & BRUSH MOWER, NEEDED  
TO MAINTAIN PROPERTY  
THREE ETROGERS IMITATION  
CHROME WITH GLASS, POOR  
CONDITION  
FIVE SOJI SCREENS  
HAWAIIAN KNIFE  
TWO SPEARS DECORATION  
A SMALL WOODEN BOAT WITH  
A SAIL DECORATION  
TEA CART BOTTOM IS BROKEN  
ONE KITCHEN TABLE WITH  
FOUR CHAIRS  
ONE DRESSER  
TWO NIGHT STANDS  
TWO SMALL SIDE TABLES  
TEA POTS  
ONE VCR  
ONE TELEVISION STAND  
TWO MINATURE LAMPS  
MISC. TOOLS  
ONE WAGON  
TWO MIRRORS



EUCALPTI HAWAIIAN INSTRUMENT  
CEMENT BUDDAH

GLASS BUDDAH

MISC. BOOK

MISC. MAGAZINES

ONE MICROWAVE NOT IN  
WORKING ORDER

TWO CHINESE SITTING  
STOOLS

ONE CAMERA

ONE SHOTGUN

ONE RIFLE

ONE COLT 45 HANDGUN

ONE 9MM HANDGUN, JOHN  
TOOK HOME

A LOT OF EXPENSIVE ELECTRONIC  
EQUIPMENT JOHN TOOK HOME TOOLS

IT WAS A SMALL CARLOAD FULL

ONE SPOTTING SCOPE JOHN  
TOOK HOME

TWO MISC CHAIRS

MISC. WICK NACKS

FOUR BRONZ RIMS

LAMINATED HOPE CHEST

COLEMAN LANTERN JOHN

TOOK HOME

TABLE WITH DRAWERS POOR  
CONDITION

AND ONE TYPEWRITER JOHN

TOOK HOME, IT BELONGS TO

MARGARET OUR AUNT

ONE SEWING MACHINE

PROMISED TO MARGARET WATKINS



DEC-02-2010 12:19 From:

To: 2601463650

P. 8/8

TWO LARGE VASES WHITE

AND BLUE

WALL CLOCK

SEVEN MINATURE KOO KOO  
CLOCKSONE REGULAR SIZE KOO KOO  
CLOCK

ONE TCE CREAM TABLE WITH

FOUR CHAIRS

BLUE MOTORCYCLE HELMET.

1 A. Yes, sir.  
2 Q. Okay. Now you have in front of you the dark  
3 red spiral binder.  
4 A. Yes, sir.  
5 Q. What is that?  
6 A. This is accounting for January 2012 and April  
7 of 2012 I began spending all my own money on Trust and  
8 my related expenses. And I just kept copies of all of  
9 it, and like I said, I would like to make sure that as  
10 of 4/12 I was paying for everything. This is basically  
11 it, and then again when I was still using Trust funds I  
12 put that information back. Anything with a dot on it  
13 meant it was Trust related.  
14 Q. I see. Now, when you say you spent your own  
15 money, I gather you mean on maintaining the Trust  
16 property; is that right?  
17 A. Yes, sir.  
18 Q. When you say your own money are you talking  
19 about the \$10,000 your mother give you?  
20 A. Yes, sir.  
21 Q. Okay. Was there any other assets of your own  
22 that you used?  
23 A. Yes, sir. I've sold some of my own  
24 belongings.  
25 Q. And what was that?

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1 Trust expenses, and at that time I hadn't written  
2 anything down on the back of the paper as I have with  
3 the other ones to document other funds I had spent.  
4 Q. I see.  
5 A. It's right here, this one right here  
6 (indicating.)  
7 MR. CREASON: Have this marked as Deposition  
8 Exhibit 17.  
9 (Deposition Exhibit No. 17  
10 was then marked for identification.)  
11 MR. CREASON: Inside Deposition 17 there is also  
12 some loose pieces of -- looks like perhaps an HVAC  
13 invoice, just some mail and some invoices along with  
14 some notes. What we'll do is have that -- I think what  
15 we'll do is ask the Reporter to make a precise  
16 duplicate so that you can have your original records  
17 back.  
18 A. Thank you.  
19 MR. CREASON: And all of us can have a copy that  
20 doesn't interrupt your bookkeeping, okay?  
21 A. Thank you very much.  
22 MR. CREASON: Do you have any objections, Darrel,  
23 or, Karin, to having us just have the Reporter take  
24 care of the copying of this because there is a lot of  
25 blank pages in these spiral notebooks. I don't see the

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1 A. Okay. I sold some handguns. I sold a  
2 shotgun. I've sold some of my own jewelry.  
3 Q. Do you have records of that?  
4 A. I believe I have records of the jewelry, but  
5 it doesn't say what's sold or not. It just gives the  
6 items that I gave to them. It is called the Diamond  
7 Shop, and for a percentage they take a percentage and  
8 then when they sell your jewelry they give you the  
9 money.  
10 Q. I see. Okay. I will ask any more about the  
11 records of that.  
12 A. Okay.  
13 Q. But we will have this one marked as  
14 Deposition Exhibit No. 16.  
15 (Deposition Exhibit No. 16  
16 was then marked for identification.)  
17 Q. (By Mr. Creason) We have the dark green  
18 spiral binder next. What is that?  
19 A. Okay. There is a lot of personal information  
20 in here and -- okay, let me see. Dad died in December  
21 so --  
22 Q. Of 2009, correct?  
23 A. Yes. So, basically the only thing that would  
24 be of interest, I believe, to you, sir, and, Mr.  
25 Aherin, is this is in-part some of mine and some of the

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1 sense of having those recopied; is that all right with  
2 everybody?  
3 MS. SEUBERT: That's fine.  
4 MR. AHERIN: (Nods head affirmatively.)  
5 Q. (By Mr. Creason) Are any of those active  
6 records, Ms. Johnson? In other words, do you make  
7 daily entrees on either of these, 14, 15, 16, or 17?  
8 A. I can't recall right now at this time exactly  
9 the date that I stopped recording, but I do have  
10 information. In other words, I have recorded  
11 everything to the best of my knowledge up until like  
12 4/2012, and then the rest of the information that was  
13 in there, I believe.  
14 Q. Okay. We'll have them returned to you as  
15 quickly as possible, then.  
16 A. Thank you.  
17 Q. And you have in front of you, then, also some  
18 manila folders.  
19 A. Yes.  
20 Q. One of which I think has already been marked  
21 as Deposition Exhibit No. 13 and then what are the  
22 other manila folders that you have?  
23 A. Okay. Please excuse me for a moment. The  
24 wrong papers inside. That was the exhibit that you  
25 spoke of. The other exhibit -- excuse me. This was a

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1 cashier's check made to Idaho State Tax Commission for  
2 my father. It was a cashier's check from Lewis Clark  
3 Credit Union, and that's in that folder.  
4 Q. Going to have to ask you just a few questions  
5 because now I think I'm beginning to understand your  
6 filing system a little bit.  
7 A. Okay, certainly.  
8 Q. And it might help us keep things straight.  
9 On what has been marked as Deposition Exhibit No. 13,  
10 the folder, that is, the manila folder, says at the top  
11 of it: Accounting for 2009 and 10; is that accurate?  
12 A. Yes, sir.  
13 Q. Okay, and who labeled this file?  
14 A. I did, sir.  
15 Q. Okay, and is it complete, to the best of your  
16 knowledge?  
17 A. No, it's not.  
18 Q. I see. Were there others of these  
19 spreadsheets that have been lost, destroyed, or  
20 someplace else?  
21 A. No, sir.  
22 Q. Okay. Why is it not complete?  
23 A. Because I was under extreme duress to get  
24 that done, and I just at that time I lost both my  
25 parents. I just did the best I could at that time.

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1 meeting with her.  
2 Q. Okay. Now, just so we are clear on this.  
3 A. Uh-huh (affirmative.)  
4 Q. Your communications with Ms. Seubert are not  
5 in here, correct?  
6 A. Ms. Seubert's information is not in there.  
7 Q. All right.  
8 MR. CREASON: Have this marked as 19.  
9 (Deposition Exhibit No. 19  
10 was then marked for identification.)  
11 Q. (By Mr. Creason) In Exhibit 19, Ms. Johnson,  
12 there appears to be a couple of invoices from Clements,  
13 Brown, McNichols with respect to the matter of Cornell,  
14 and it seems to reference the Trust. To your knowledge  
15 were all of the services by Clements, Brown & McNichols  
16 that were provided to you provided in connection with  
17 your duties as Trustee?  
18 A. Yes, sir.  
19 Q. All right, and the next folder is what?  
20 A. Okay. Please excuse me. This is me  
21 documenting information in regards to Alison Brandt.  
22 This is a copy of some of the monies that I put into  
23 for the Trust and myself, and then there is an envelope  
24 from Ms. Alison Brandt. Then here are a rough draft of  
25 you owe part of the accounting of the furniture and the

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1 Q. Okay, and did you do these records at or  
2 about the time that the entry was -- in other words,  
3 did you make these entrees on a monthly basis or daily  
4 basis or what, on the spreadsheets?  
5 A. On this one I don't recall.  
6 Q. Did you make the entries on these  
7 spreadsheets at or near the time that the event  
8 recorded occurred?  
9 A. I'm not sure what you mean by the event  
10 occurred.  
11 Q. Well, did you make these spreadsheets or have  
12 them made back in 2010?  
13 A. Yes, sir.  
14 (Deposition Exhibit No. 18  
15 was marked for identification.)  
16 MR. CREASON: And the next one, which is going to  
17 be marked as Deposition Exhibit No. 18 is -- I'm going  
18 to ask that the Reporter copy the folder label, as well  
19 as the document inside. The document inside is simply  
20 an Idaho State Tax Commission check stub.  
21 Q. (By Mr. Creason) Now, what's the next one we  
22 have, Ms. Johnson?  
23 A. Okay, this will be some of my attorney's fees  
24 starting with 2010, and I don't have all of  
25 Ms. Seubert's billing with me. This was from prior to

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1 likes of that.  
2 Q. When did you prepare those records?  
3 A. This here, roughly 2010. This letter that I  
4 wrote about Ms. Brandt is 3/29/11.  
5 MR. CREASON: Okay, and that folder will be  
6 Deposition Exhibit No. 20.  
7 (Deposition Exhibit No. 20  
8 was then marked for identification.)  
9 Q. (By Mr. Creason) And the next folder?  
10 A. Okay. It is money I deposited into the  
11 checking, Wells Fargo checking. I believe it might be  
12 some of the same information as far as money I  
13 deposited, and it is on a little card.  
14 MR. CREASON: Okay. We'll ask Exhibit No. 21 be  
15 marked.  
16 (Deposition Exhibit No. 21  
17 was then marked for identification.)  
18 Q. (By Mr. Creason) And on that folder,  
19 Ms. Johnson, you say money I deposited. What do you  
20 mean by that?  
21 A. Okay. In other words, from myself, out of my  
22 funds into the regular checking account to pay for some  
23 Trust items and for myself as well.  
24 Q. Okay. Was this part of the \$10,000 that your  
25 mother had given you?

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1 A. No, sir.  
2 Q. Where did these monies come from?  
3 A. Okay. The 73.70 I'm not sure. 1400 I'm not  
4 sure. My dad did have a death benefit fund that was  
5 supposed to have been paid to me. My brother said, no  
6 problem. It was sent to him. His wife kept 500 of it,  
7 and I got the other part. I don't remember how much  
8 that was. So, that's the best I can tell you on that.  
9 Q. Why did you believe the death benefit was  
10 supposed to go to you?  
11 A. Because my dad said so, and, of course, when  
12 he was ill he had problems doing certain things, and he  
13 said I made a mistake. I said, oh, don't worry about  
14 it, dad, because it didn't matter to me one way or the  
15 other. But my brother agreed to send me part of the  
16 money back.  
17 Q. All right, and you have another folder there?  
18 A. Yes, sir. And I don't know why I brought  
19 this one. It says December 31st, 2009, Lewis and Clark  
20 Credit Union and there is one statement that says Lewis  
21 Clark Credit Union and on it I wrote, taxes and house  
22 insurance paid from this account. There is also a  
23 receipt, and I don't recall what that is about, from  
24 Lewis and Clark Credit Union.  
25 MR. CREASON: Have this marked as Deposition

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1 MR. CREASON: Thank you.  
2 Q. (By Mr. Creason) Exhibit No. 22 is just a  
3 couple of, looks like, a receipt from Lewis Clark  
4 Credit Union and a notice of an annual meeting of the  
5 Lewis Clark Credit Union, but it does indicate that  
6 there it is at least partially a statement from Lewis  
7 Clark Credit Union. I did not see on the inventory of  
8 assets Lewis Clark Credit Union account, Ms. Johnson.  
9 Do you recall -- oh, I see. Is this the -- I see it  
10 now, 27057 -- yes, okay. Did you close 27 -- no, it  
11 still has \$8.76 in it; is that correct?  
12 A. I believe so.  
13 Q. To your knowledge, Ms. Johnson, were there  
14 any other financial institutions in which your dad had  
15 accounts at the time of his death other than the Wells  
16 Fargo accounts and the Lewis Clark Credit Union  
17 account?  
18 A. Not at all, to my knowledge.  
19 Q. And other than the life insurance or the  
20 death benefits that were at least referenced --  
21 A. Part of it.  
22 Q. -- in Exhibit No. 21, were there other life  
23 insurance or death benefits payable to your dad's  
24 beneficiaries or named beneficiary at the time of his  
25 death?

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1 Exhibit No. 21 -- 22, I'm sorry.  
2 (Deposition Exhibit No. 22  
3 was then marked for identification.)  
4 MR. CREASON: Thank you.  
5 MS. SEUBERT: Do you mind if I just confer with  
6 Toni for just a minute.  
7 MR. CREASON: All right.  
8 MS. SEUBERT: I would just like to mention that  
9 as we are going through the records there was some of  
10 Ms. Johnson's records that my office has that I used in  
11 preparing her response to discovery. All the bank  
12 statements were provided but didn't take the time to go  
13 through and make copies of all the various invoices in  
14 the folders that were made. I can have someone from my  
15 office bring that over if you would like to go through  
16 that as part of this deposition.  
17 MR. CREASON: You know, I don't know that that is  
18 necessary at this point. Rather than take the time to  
19 explain every invoice and so on, I think that if you  
20 just provide us copies that will suit my needs in  
21 response to the discovery request.  
22 MS. SEUBERT: So, we'll prepare supplemental  
23 discovery response with copies of all the invoices that  
24 were not included in the bank statements already  
25 provided.

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1 A. I think later they did end up sending me  
2 something, but I can't recall for how much or when.  
3 Q. They, who is they?  
4 A. To be honest, I don't know. All I know --  
5 oh, excuse me, IBEW, I believe is an electrical fund or  
6 something to that nature. I can't swear to it.  
7 Q. Do you recall approximately how much that  
8 was?  
9 A. I can't at this time.  
10 Q. Where did you deposit that money?  
11 A. I believe I deposited it in the Wells Fargo  
12 checking account.  
13 Q. All right. Did you have any other accounts  
14 that you utilized or opened in order to deposit monies  
15 that pertained to the Trust?  
16 A. The only account, and it is in my dad's name,  
17 there is -- it was like a savings. It was supposed to  
18 be for me, but they used his name on it for tax  
19 reporting purposes. And I paid a bill on that, and  
20 that is in your records. It was roughly \$1,000.  
21 Q. I see.  
22 A. And that's it.  
23 Q. Got some additional documents that I'm going  
24 to ask you to identify for me. I think probably  
25 everybody else here knows exactly what this is and what

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1 the genesis of it was, but I'm new to this case a  
2 little bit by comparison so bear with me.  
3 A. Certainly.  
4 Q. Here is Deposition Exhibit No. 3.  
5 A. Okay.  
6 Q. And can you tell me have you ever seen that  
7 before?  
8 A. I don't recall seeing it at all.  
9 Q. Okay. Were you aware of the fact that Lot 34  
10 of the Lake View First Edition is part of that 15 acres  
11 that you described to me a bit earlier?  
12 A. I do know that the lots in the Trust are 34,  
13 35, and 36.  
14 Q. Okay. Were you aware that in 2002 Michael  
15 Stanley Cornell and Arlie Mary Cornell gave a gift deed  
16 to your brother of Lot 34?  
17 A. I don't recall that right now.  
18 Q. Did you receive a like gift at that time?  
19 A. Absolutely not.  
20 Q. Okay. Did you ever become aware of it prior  
21 to the time that your parents died; that they had given  
22 10 acres or -- excuse me, Lot 34 to John?  
23 A. I don't recall.  
24 Q. Did your parents ever give you any real  
25 estate?

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1 Alison M. Brandt. Is that the same person that you  
2 indicated was remiss in advice that she gave to you?  
3 A. Correct, sir.  
4 Q. This may be simply typographical. I suspect  
5 that it is.  
6 A. Uh-huh (affirmative.)  
7 Q. But it appears to be notarized on March, 21st  
8 day of March, 2004, and yet the instrument itself is  
9 dated and recorded in March of 2005. Do you have any  
10 knowledge of that discrepancy?  
11 A. I do not.  
12 Q. Okay. Let me show you Deposition Exhibit No.  
13 5. Do you recognize that document?  
14 A. No, sir.  
15 Q. Were you aware there came a time when John  
16 Cornell quitclaimed Lot 34 back to his parents'  
17 Revocable Trust?  
18 A. Yes, sir.  
19 Q. Okay. Are you aware of what the  
20 circumstances were of that transfer?  
21 A. A couple of things. One is he owed a lot of  
22 money, and secondly that he was wanting out from his  
23 wife and so he wanted, I guess, not for her to do  
24 anything. I don't know.  
25 Q. How did you come to gain that information?

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1 A. No, sir.  
2 Q. I'm going to show you now Deposition Exhibit  
3 No. 4.  
4 A. Okay. Thank you.  
5 Q. Have you seen that document before?  
6 A. No, sir.  
7 Q. Okay. Do you understand that it is the  
8 document that transferred Lots 35 and 36 Lake View  
9 Edition from your parents to the Family Trust?  
10 A. I don't recall.  
11 Q. Okay. Were you involved in their estate  
12 planning back in 2005?  
13 A. No, sir.  
14 Q. Did you do bookwork for your parents prior to  
15 the time your mother died?  
16 A. I paid all their bills and everything that  
17 needed to be taken care of, but I didn't do any  
18 bookwork, per se.  
19 Q. I see.  
20 A. I wouldn't say.  
21 Q. Were you acquainted with the terms of the  
22 Trust back in 2005?  
23 A. No, sir.  
24 Q. I see that this instrument that I have given  
25 you is Deposition Exhibit No. 4, was notarized by

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1 A. Well, he told me that he wanted to get out of  
2 the marriage.  
3 Q. When did he tell you this?  
4 A. If I'm not mistaken I'm guessing -- I could  
5 be wrong -- I'm guessing 2 or 3 of 2010.  
6 Q. Okay. This quitclaim deed was dated the 3rd  
7 of January, 2007.  
8 A. Uh-huh (affirmative.)  
9 Q. Is that the time that you understood that he  
10 wanted to get out of his marriage?  
11 A. Uhm, I realize what you are saying, but I  
12 don't recall at this time.  
13 Q. Were you aware that your brother sent money  
14 to pay the taxes on Lot 34 after he quitclaimed it back  
15 to the Trust?  
16 A. I can't recall that.

RECEPTION ☒ INDEXED ☒ *TH*  
FILMED ☐ DELIVERED ☐  
MAILED ☐

19028

Instrument # 190928  
CLEARWATER COUNTY, OROFINO, IDAHO  
2002-11-18 02:00:00 No. of Pages: 1  
Recorded for: LINDA DAVIS - EMPIRE REALTY  
ROBIN CHRISTENSEN Fee: 3.00  
Ex-Officio Recorder Deputy *Linda Davis*  
RETURN TO: \*

DEED OF GIFT

This Deed of Gift is made this 16th day of November, 2002, between

MICHAEL STANLEY CORNELL and ARLIE MARY CORNELL, husband and wife,  
of Orofino, Idaho, the donors, and JOHN HENRY CORNELL, a single man, 4119  
Eureka Ridge Road, Orofino, Idaho, the donee.

The donors, for and in consideration of love and affection which the donors have  
and bear unto the donee, their son, and for the purpose of making him a gift, do by these  
presents give, grant, transfer and release unto the donee, the following described real  
property, situated in the County of Clearwater, State of Idaho, to-wit:

Lot 34, Lakeview First Addition  
according to the recorded plat thereof.

together with all and singular the tenements, hereditaments and appurtenances  
thereunto belonging or in anywise appertaining.

TO HAVE AND TO HOLD the same unto the donee, his heirs and assigns,  
forever.

IN WITNESS WHEREOF, the donors have executed this Deed of Gift the day  
and year first above written.

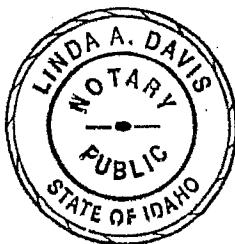
*Michael S. Cornell*  
MICHAEL STANLEY CORNELL

*Arlie M. Cornell*  
ARLIE MARY CORNELL

STATE OF IDAHO )  
County of Clearwater )

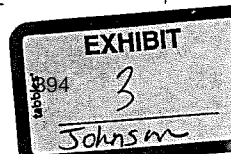
On this 16th day of November, 2002, before me a notary public in and for  
the State of Idaho, personally appeared MICHAEL STANLEY CORNELL and  
ARLIE MARY CORNELL, husband and wife, known to me to be the persons  
whose names are subscribed to the within instrument and acknowledged to me  
that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official  
seal the day and year in this certificate first above written.



*Linda A. Davis*  
Notary public in and for the  
State of Idaho, residing at  
Orofino, therein. My  
commission expires: 11-21-05

\* JOHN HENRY CORNELL  
4119 EUREKA RIDGE ROAD  
OROFINO, ID 83544



SECTION 1 INDEXED ☒  
MED ☐ VERIFIED ☐  
MAILED ☐

204674

Instrument # 204674  
CLEARWATER COUNTY, IDAHO  
2007-01-09 \* 04:43:00 No. of Pages: 2  
Recorded for: ALISON BRANDT  
ROBIN CHRISTENSEN Fee: 6.00  
Ex-Officio Recorder Deputy *Andy G*

QUITCLAIM DEED

Return To: \*

THIS INDENTURE, made this 3rd day of January, 2007, between JOHN HENRY CORNELL, a married person dealing with his sole and separate property, P.O. Box 61, Heyburn, Idaho 83336, hereinafter referred to as GRANTOR, and MICHAEL STANLEY CORNELL and ARLIE MARY CORNELL, as Trustees for the MICHAEL S. CORNELL AND ARLIE M. CORNELL REVOCABLE TRUST, dated November 1, 1996, referred to as GRANTEE.

WITNESSETH: That the GRANTOR, for and in consideration of the sum of Ten DOLLARS lawful money of the United States of America, and other good and valuable consideration, to her in hand paid by the GRANTEE, the receipt whereof is hereby acknowledged, does by these presents remise, release and forever QUITCLAIM unto the said GRANTEE, and to said GRANTEE'S heirs, successors and assigns all that certain lot, piece, or parcel of land, including any after acquired title or interest, situate, lying, and being on said property, located in Clearwater County, Idaho, described as follows, to-wit:

Lot 34, Lakeview First Addition, according to the recorded plat thereof.

SUBJECT TO:

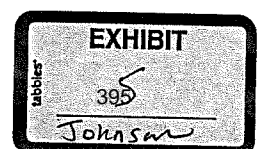
An Easement granted to the United States of America, as set forth in the document recorded on the records of Clearwater County, State of Idaho, on November 10, 1976, as Instrument No. 113412.

An Easement for access and utilities as shown on the recorded plats of the above-described property recorded on the records of Clearwater County, State of Idaho, as Instrument No. 109374.

Restrictions and covenants as contained in Land Use Agreement recorded as Instrument No. 109375, records of Clearwater County, State of Idaho.

An Easement granted to Clearwater Power Company recorded on the records of Clearwater County, State of Idaho, on November 4, 1992, as Instrument No.

QUITCLAIM DEED - 1





160985.

TOGETHER WITH all singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, the reversion and reversions, remainder and remainders, rents, issues and profits thereof, including after acquired title or interest.

TO HAVE AND TO HOLD, all singular the said premises, together with appurtenances, unto the GRANTEE, and to the heirs, successors, and assigns forever.

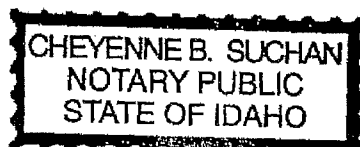
IN WITNESS WHEREOF, the GRANTOR has hereunto set his hand the day and year first above written.

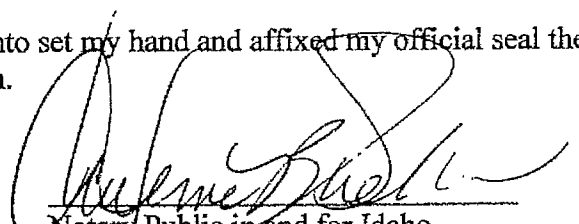
  
JOHN HENRY CORNELL

STATE OF IDAHO )  
 ) ss.  
County of Minidoka )

On this 3<sup>rd</sup> day of January, 2007, before me, a notary public in and for the State of Idaho, personally appeared JOHN HENRY CORNELL, a married person dealing with his sole and separate property, known or identified to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



  
Notary Public in and for Idaho.  
Residing at: Paul 10  
Commission Expires: My Commission Expires: November 22, 2008

1 don't recall.  
2 Q. Okay. How was his health at that time?  
3 A. Please excuse me, I'm thinking. I'm still  
4 not over the death of my brother so I -- that question  
5 escapes me right now. Could you please restate it one  
6 more time.  
7 Q. How was John's health -  
8 A. His health.  
9 Q. -- at the time that he was living at home in  
10 Clearwater County?  
11 A. I would say okay.  
12 Q. Okay. Had he had any serious health problems  
13 that you are aware of?  
14 A. Yes, sir.  
15 Q. When did he have serious health problems?  
16 A. It was very high blood pressure. He was  
17 working for Swift as a truck driver, and then I later  
18 found information that he had HIV.  
19 Q. Okay. Do you know did he discuss that with  
20 you?  
21 A. He didn't personally, but he kept telling  
22 me -- he says -- please excuse me. I didn't understand  
23 what he was talking about because he was a different  
24 individual, and he'd say, well, I'm not going to live  
25 long, something like that. That's the best I can

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1 what I'm wanting to know is: Have you've had any  
2 experience or training with acting as a Trustee, other  
3 than this Trust here?  
4 A. I haven't had any training, and I had hired  
5 an attorney prior to Ms. Seubert that was -- I'm trying  
6 to think of the proper term, and I don't want to sound  
7 negative, but she was extremely remiss, to say the  
8 least.  
9 Q. I see, and you hired a lawyer to help you  
10 with your duties as a Trustee; is that correct?  
11 A. Yes, sir.  
12 Q. Okay. How did you choose the lawyer?  
13 A. Well, sir, my dad had used her before, and I  
14 didn't know who else to go to.  
15 Q. Okay. So, you retained a lawyer to serve as  
16 your counsel as Trustee for your parents' Family Trust;  
17 is that accurate?  
18 A. Please excuse me. Could you please restate  
19 the question again?  
20 Q. So you retained this attorney to assist you  
21 in carrying out your duties as Trustee for your  
22 family's Trust; is that correct?  
23 A. Yes, sir.  
24 Q. Okay, and do you know approximately when you  
25 retained that attorney for that purpose?

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1 answer that right now.  
2 Q. How did you come to know that he had HIV?  
3 A. I was looking for information for this case,  
4 and I found a document that stated so, sir.  
5 Q. All right. So, this was after he was  
6 deceased; is that correct?  
7 A. Yes, sir.  
8 Q. And when you say you found a document, is  
9 that a medical record or something else?  
10 A. Sir, I believe, to best of my knowledge, it  
11 was a medical record. It was something like this  
12 (indicating,) and it stated something to the fact of --  
13 I believe he could only have a license for one year due  
14 to his HIV, and he would have to be rechecked. Please  
15 excuse me.  
16 Q. Do you still have a copy of that record?  
17 A. Yes, sir, I do.  
18 Q. Would you -- did you bring it with you today?  
19 A. No, sir, I did not.  
20 Q. Would you provide a copy of that to your  
21 attorney and allow her to provide a copy of that to me?  
22 A. Absolutely, sir.  
23 Q. Now, I understand that for a time you worked  
24 for a credit union as a teller and in security, and you  
25 have some other college training and the like. But

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1 A. Will you excuse me, please, just a moment.  
2 Q. Sure.  
3 A. I can't recall right now.  
4 Q. Okay. I have a few items that I want to show  
5 you and ask you about, and I have provided copies of  
6 them to your counsel. And she has probably seen them  
7 and perhaps you have, too, before, but this is marked  
8 as Exhibit No. 1 to this deposition.  
9 A. Okay.  
10 Q. I'm going to ask you to look over it and tell  
11 me whether or not you have seen that before.  
12 A. Okay. Yes, sir.  
13 Q. And did you see it at or about the time it  
14 was mailed to your brother on April 26th of 2010?  
15 A. I don't recall exactly. All I know is he  
16 began harassing me on the phone to a very bad degree,  
17 and I wasn't sure what to do so I called the attorney.  
18 Q. Was that the attorney that was representing  
19 the Trust?  
20 A. Yes, sir.  
21 Q. Is that the attorney you referred to that  
22 was -- I can't remember the word you described --  
23 remiss, I think, is the word you used?  
24 A. Yes, sir.  
25 Q. All right. Had Ms. Brandt been representing

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1 the Trust for some period of time before this?  
2 A. All I recall is my dad had some work done by  
3 her, and I just can't recall at this time.  
4 Q. Did you ever meet with Ms. Brandt and your  
5 brother at the same time?  
6 A. No, sir.  
7 Q. Do you recall the date your dad died?  
8 A. Yes, sir.  
9 Q. What was that?  
10 A. November 15th, 2009.  
11 Q. In this letter that you have in front of you  
12 there on Exhibit 1, the second paragraph says: I met  
13 with your sister, Ms. Toni Johnson, regarding the  
14 distribution of the Michael S. Cornell and Arlie M.  
15 Cornell Revocable Trust before I received your message.  
16 As you know Ms. Johnson is the Successor Trustee of  
17 your parents' trust, and you and Ms. Johnson are the  
18 sole beneficiaries. Do you recall a meeting with  
19 yourself and Alison Brandt at some time prior to this  
20 letter?  
21 A. I can't recall at this time.  
22 Q. Okay. Is that statement accurate to the best  
23 of your knowledge; that she had met with you regarding  
24 the distribution of a Michael S. Cornell and Arlie M.  
25 Cornell Revocable Trust?

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1 Q. All right. So, is it your testimony that you  
2 didn't know that you had a fiduciary obligation to the  
3 Estate?  
4 A. No, I believe I had a fiduciary duty to  
5 protect the home and everything I could.  
6 Q. Okay, and this goes on to say: Trustees must  
7 ensure that Trust assets are managed appropriately  
8 while Trust administration takes place. Were you aware  
9 of that?  
10 A. I don't -- this was not said to me, but I did  
11 the very best I could. And my brother said that I  
12 could use monies to pay my own expenses.  
13 Q. Do you have any documents that indicate to  
14 you your brother said anything with respect to how you  
15 might be able to use money from the Trust?  
16 A. I do not, sir. It was verbal.  
17 Q. In this letter Ms. Brandt says to your  
18 brother, the last paragraph on the first page: While  
19 we wait for a buyer for the home there are many monthly  
20 expenses associated with subdivision in which your  
21 parents' home is located that Ms. Johnson will need to  
22 pay from the Trust bank account funds. She will  
23 further use the funds minimally to do any necessary  
24 small repairs that the Realtor may suggest to improve  
25 the home's sale potential. Do you see that?

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1 A. She met with me, but I don't recall her  
2 discussing anything about distribution of anything.  
3 Q. This letter goes on to say in the next  
4 paragraph: Ms. Johnson is fully aware that she has a  
5 fiduciary obligation to the Estate. Do you understand  
6 what that says?  
7 A. I believe I do.  
8 Q. Okay, and did you represent to Ms. Brandt and  
9 subsequently, then, to your brother that you were fully  
10 aware that you had a fiduciary obligation to the Trust  
11 Estate?  
12 A. I don't recall saying anything or speaking to  
13 my brother about that. Please excuse me. Could you  
14 ask the question again?  
15 Q. Did you instruct Ms. Brandt -- let's just ask  
16 it that way --  
17 A. Uh-huh (affirmative.) Uh-huh (affirmative.)  
18 Q. -- to advise your brother that you were fully  
19 aware that you had a fiduciary obligation to the Trust  
20 Estate?  
21 A. I didn't ask her to say anything.  
22 Q. All right. Did you represent to her that you  
23 were fully aware that you had a fiduciary obligation to  
24 the Trust Estate?  
25 A. Those are her words, not mine.

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1 A. Yes, sir.  
2 Q. Did you understand that you were authorized  
3 to use money from the Trust for these purposes listed  
4 here?  
5 A. Yes, sir.  
6 Q. And how did you come to that understanding?  
7 A. Because it solely dealt with the Trust as far  
8 as the subdivision fees and power fees and that.  
9 Q. All right. Do you have any assets that are  
10 your assets?  
11 A. Yes, I do.  
12 Q. Okay, and who manages those?  
13 A. As far as what I have?  
14 Q. Yes.  
15 A. They are just personal possessions in the  
16 home.  
17 Q. In the Trust home?  
18 A. Yes, sir.  
19 Q. Okay. Now, do you have your own separate  
20 bank accounts?  
21 A. I do, sir.  
22 Q. Okay, and who manages those?  
23 A. I do, sir.  
24 Q. And where are they?  
25 A. I have one at American West Bank in Orofino,

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1 Idaho.  
2 Q. And are these savings accounts or checking  
3 accounts?  
4 A. It is just a checking account.  
5 Q. Okay. What's your personal net worth? This  
6 is not any Trust property at all; this is just your  
7 personal net worth.  
8 A. I couldn't say right now right off the bat.  
9 I don't know.  
10 Q. All right. Do you have a rough estimate of  
11 what your bank account, what the balance of your bank  
12 account stands at right now?  
13 A. Probably \$187 and change.  
14 Q. Do you add to that monthly?  
15 A. Not at this time, but I will be.  
16 Q. Where will that come from?  
17 A. If everything goes correctly, SSI.  
18 Q. Have you applied for SSI?  
19 A. It was applied for me. I was in the  
20 hospital.  
21 Q. Did you deposit money regularly in your  
22 checking account?  
23 A. I did.  
24 Q. Where did you receive income?  
25 A. Towards the end. I had money that my mom had

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1 A. I have a 1987 Jeep Wrangler that is not  
2 working.  
3 Q. Do you own any other vehicles?  
4 A. My dad and I owned an Isuzu Trooper. On the  
5 title it says Toni or Michael.  
6 Q. What year is that?  
7 A. 2002.  
8 Q. Did you buy that with your own funds?  
9 A. The Isuzu or the Jeep?  
10 Q. The Isuzu.  
11 A. No, my father purchased it.  
12 Q. Okay. So, was your name on the title for  
13 convenience?  
14 A. No, sir. My dad knew he was dying, and he  
15 wanted to make sure I had a vehicle to drive.  
16 Q. Oh, so when he bought it -- when did he buy  
17 it?  
18 A. 2002. He knew I did the main driving for my  
19 mom or he because his eyesight was not good.  
20 Q. All right. Have you been on the title to  
21 that vehicle for all of the time that he owned it or  
22 was it just recently that he put your name on the  
23 title?  
24 A. Not at the time that he purchased it, and I  
25 can't recall when he put me on the title.

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1 given to me because I wore out my car and took care of  
2 them. She said to keep it for emergency uses only.  
3 Q. And this was in the same checking account at  
4 American West?  
5 A. Yes, sir.  
6 Q. How much money was that?  
7 A. \$10,000.  
8 Q. This was given to you by your mother before  
9 she died?  
10 A. Long, long before she died.  
11 Q. Are there any other accounts other than your  
12 American West bank account?  
13 A. I have a Hughes Aircraft Federal Credit  
14 Union, and it is abbreviated -- excuse me, I can't say  
15 it right now. And there is probably, I'm guessing,  
16 roughly 5 to \$7.00 in either savings or checking. I'm  
17 not sure, and there might be another \$5.00.  
18 Q. Anything else?  
19 A. Just a few cents, maybe, in another account,  
20 but that's it.  
21 Q. And where is the other account?  
22 A. Same, Hughes Aircraft Federal Credit Union.  
23 Q. Okay. Do you own a car?  
24 A. I do.  
25 Q. What is it?

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1 Q. Now, are there any other personal assets that  
2 you claim are your own, apart from any of the assets  
3 that are in the Trust?  
4 A. I have several things in the home.  
5 Q. All right. And they are furniture, is that  
6 accurate?  
7 A. Furniture. I can't think of the name of  
8 them -- furniture. I have some TVs. What do you call  
9 -- some decorations, statutes, and at this moment I  
10 can't think of anything else right now.  
11 Q. Do you have some art?  
12 A. That's a good question. I purchased some  
13 prints for my mother, and so I don't know who that  
14 would belong to at this point. But I don't own any art  
15 myself.  
16 Q. Do you own any collectables yourself?  
17 A. I do.  
18 Q. What are they?  
19 A. Lladro mermaids.  
20 Q. Any other collectables?  
21 A. I do, but I can't think right now about that.  
22 Q. What's the value of the Lladro mermaids?  
23 A. I'm guessing roughly around \$1,000.  
24 Q. Do you have any antiques that are yours?  
25 A. I don't own any antiques. Well, no, I take

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1 that back. I do have a -- please excuse me. I am  
 2 trying to think of the name of it. I do have a chaise  
 3 lounge.  
 4 Q. When did you acquire that?  
 5 A. Many, many years ago.  
 6 Q. So, any house or home furnishings that there  
 7 are in the house other than the chaise lounge and the  
 8 Lladro mermaids are properties that belonged to the  
 9 Trust; is that correct?  
 10 A. Please restate the question again.  
 11 Q. So, in the house you have certain personal  
 12 items that you have named: The Lladro mermaids and the  
 13 chaise lounge. And other than that, all of the  
 14 property that's in the house is property of the Trust;  
 15 is that correct?  
 16 A. I own some other things, I can't think of at  
 17 this time, but the rest of it is the Trust, yes.  
 18 Q. Okay. Do you receive any disability payments  
 19 of any kind at this time?  
 20 A. Not at this time. It is in the works.  
 21 Q. All right. Are you represented by legal  
 22 counsel in your efforts to get Social Security?  
 23 A. No, I'm not. I received a letter from Social  
 24 Security.  
 25 Q. I see. All right. Now, this real estate

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1 Q. The top of the page there Ms. Brandt says:  
 2 Currently Ms. Johnson feels pressure from you to  
 3 liquidate the assets of the Trust and disburse the  
 4 money immediately. Do you recall feeling any pressure  
 5 to liquidate the assets from John?  
 6 A. Please excuse me, I'm thinking. I wouldn't  
 7 say that I felt pressure. I was being extremely  
 8 harassed via telephone, and I was bodily injured as  
 9 well by him.  
 10 Q. Did you tell Ms. Brandt about that?  
 11 A. Yes, sir, I did.  
 12 Q. She mentioned something here about, due to  
 13 circumstances at this time Ms. Johnson cannot fulfill  
 14 her fiduciary obligation as Successor Trustee and  
 15 liquidate the assets as you wish. What circumstances  
 16 is she talking about, do you know?  
 17 A. I can't recall at this time. Can you please  
 18 point out which paragraph that is?  
 19 Q. Oh, okay. It is the second sentence here on  
 20 the paragraph there.  
 21 A. Okay, sure. I appreciate that, sir. Thank  
 22 you. I don't recall that. She stated some things just  
 23 because she stated them. They are not things -- I just  
 24 can't answer anymore on that.  
 25 Q. There isn't any doubt in your mind that as

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1 that the Trust owns, on that real estate the house is  
 2 located, correct?  
 3 A. Yes, sir.  
 4 Q. And how many acres is that parcel?  
 5 A. On the house, the parcel for the house itself  
 6 or cumulative?  
 7 Q. All of the real estate that's being held in  
 8 the name of the Trust.  
 9 A. Okay, that would be 15 acres.  
 10 Q. Okay. Do you claim to own any part of that  
 11 as your own personal property; that is, your own  
 12 individual property apart from the Trust?  
 13 A. Are you asking if -- please excuse me. Can  
 14 you restate that one more time?  
 15 Q. In any of that 15 acres do you claim any of  
 16 that as your individual property apart from the Trust?  
 17 A. No, sir.  
 18 Q. Okay. To your knowledge is the 15 acres the  
 19 only real estate that the Trust owns in Clearwater  
 20 County?  
 21 A. Yes, sir.  
 22 Q. Okay. All right. I just wanted to call your  
 23 attention just briefly again to Exhibit No. 1 on the  
 24 second page.  
 25 A. Okay.

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1 far as John was concerned he wanted the Trust  
 2 liquidated right away after your parents died; is that  
 3 correct?  
 4 A. No, sir. That is not correct. And I realize  
 5 what legal is, is legal is. My brother and I sat down  
 6 and made a list of the things he wanted. He told me,  
 7 you can keep the money, you can keep the house, which I  
 8 realize that is not the case. Please excuse me. But I  
 9 don't recall anything about the money issue at this  
 10 time.  
 11 Q. Okay. The last paragraph there says:  
 12 Ms. Johnson would prefer that your communications be  
 13 through me, so if you would like to be updated on  
 14 progress please do not hesitate to write to me and  
 15 advise me of such. Do you see that sentence?  
 16 A. Yes, sir, I do.  
 17 Q. Does that accurately state your wishes?  
 18 A. Yes, sir.  
 19 Q. Did you ever have any communications directly  
 20 with John after that?  
 21 A. At that time she, Alison Brandt, told John  
 22 that if he continued to contact me because he harassed  
 23 me so badly that she would have to get a restraining  
 24 order on him, and he just would call and scream and  
 25 yell and stuff like that. And I had -- I think I had a

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1 conversation with him about what he did to me as far as  
 2 injuring my body.  
 3 Q. Okay. After this letter --  
 4 A. Yes, sir.  
 5 Q. -- sometime after she said, you just talk to  
 6 me, did you have any further conversations with your  
 7 brother?  
 8 A. I can't recall at this time.  
 9 Q. Okay. Did you ever see him again?  
 10 A. The last time I saw him was the day that he  
 11 injured me.  
 12 Q. Which was what day?  
 13 A. It was -- please excuse me. I believe  
 14 February or March of 2010, approximately.  
 15 Q. Did this injury require any medical  
 16 attention?  
 17 A. No, sir.  
 18 Q. Did you report this injury to the police?  
 19 A. No, sir, but I did put him on report to a  
 20 neighbor of mine that is a reserve deputy for  
 21 Clearwater County Sheriff.  
 22 Q. Who was that?  
 23 A. Gary, G-a-r-y, Tragesser, T-r-a-g-e-s-s-e-r.  
 24 Q. Okay. Was this the same encounter, that is,  
 25 the one where you claim your body was injured by

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1 before, to your knowledge?  
 2 A. I have not. In fact, she has had the wrong  
 3 address to send to me in the past, and she's never been  
 4 one to send me things that I should have. At some  
 5 point she didn't respond to me for three, four months.  
 6 Q. Okay. Well, let's talk about the substance,  
 7 subject matter of this, to see if you have any  
 8 recollection of some of the events that are referenced  
 9 here.  
 10 A. Okay.  
 11 Q. This is under date of December 2nd, 2010, and  
 12 on the fourth paragraph in her letter Ms. Brandt  
 13 addresses to Darrel Aherin. She says: Ms. Johnson has  
 14 not disposed of any assets other than she has used some  
 15 monies in the Trust to pay expenses associated with the  
 16 real property and my fee. The main asset in the Trust  
 17 is the Cornell home which is listed with the Real  
 18 Estaters through Mike Harrington, Realtor. I'm not  
 19 sure what is next there. The list price is \$445,000.  
 20 Do you see that?  
 21 A. Yes, sir.  
 22 Q. All right. Is it a true statement that at  
 23 the time of the letter of December 2nd, 2010 you had  
 24 not disposed of any of the assets of the Trust except  
 25 for to pay expenses associated with the real property

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1 something that John did?  
 2 A. Yes, sir.  
 3 Q. Was there anybody present at the time when  
 4 this occurred?  
 5 A. No, sir.  
 6 Q. To your knowledge, did your brother John ever  
 7 communicate directly to Alison Brandt concerning  
 8 information he wanted to pass onto you?  
 9 A. She never gave me anything in those regards.  
 10 Q. Okay. Go to Exhibit No. 2. We will give  
 11 Exhibit No. 1 to Kristi and let her try to keep track  
 12 of that.  
 13 A. Certainly.  
 14 Q. And I'm going to ask you to read that. It  
 15 isn't the world's best copy.  
 16 A. Okay.  
 17 Q. But if you'll take a look there and tell me  
 18 whether or not you've seen that before.  
 19 A. Okay. I don't recall seeing this.  
 20 Q. All right. It says -- you'll see there on  
 21 the second page at the bottom it says CC: Client?  
 22 A. Please excuse me.  
 23 Q. Do you see that, where it says CC: Client?  
 24 A. I do.  
 25 Q. Are you saying that you've never seen this

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1 and Ms. Brant's fee?  
 2 A. I also paid for myself for my expenses as  
 3 well.  
 4 Q. Did you tell Ms. Brandt that?  
 5 A. Oh, yes, sir. In fact, my brother was fully  
 6 aware of that. He agreed to it.  
 7 Q. Is it a true statement that the main asset of  
 8 the Trust was the Cornell's home?  
 9 A. Yes, sir.  
 10 Q. And was it also true that the house was  
 11 listed through the Real Estaters at \$445,000?  
 12 A. I believe, sir, according to my Realtor it  
 13 was listed at \$450,000 originally.  
 14 Q. Okay. How much money had you taken from the  
 15 Estate for your own expenses at that point?  
 16 A. I can't recall.  
 17 Q. How much money had you paid from the Trust  
 18 for Ms. Brandt's fee?  
 19 A. I believe one was initial was between 150 and  
 20 \$175. The second one was \$1500, but the retainer was  
 21 used up by my sibling and his attorney. And it went --  
 22 I can't recall exactly how much over it went, but  
 23 roughly that amount of money.  
 24 Q. You've provided some Answers to  
 25 Interrogatories in request for production. You've

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1 signed those with your lawyer, in which you provided  
2 some bank accounts that were bank accounts of the  
3 Trust.  
4 A. Uh-huh (affirmative.)  
5 Q. And it also provided some copies of checks  
6 that were issued from those bank accounts, and those  
7 were also a debit card, apparently, and so there are  
8 certain things listed as to where those monies were  
9 paid out?  
10 A. Uh-huh (affirmative.)  
11 Q. I couldn't find, and maybe it was just that I  
12 wasn't patient enough, but I couldn't find where this  
13 money came from that went to pay Alison Brandt.  
14 A. Okay. That would have been a cashier's  
15 check, two of them, from Wells Fargo Bank.  
16 Q. Okay. So, it wouldn't be reflected in the  
17 materials that you've provided to me?  
18 A. It would not, however -- I don't think I  
19 brought them. No -- I paid with cashier's checks. It  
20 would be on this summary. Excuse me, Karin.  
21 MS. SEUBERT: Can we go off the record?  
22 MR. CREASON: Sure. Let's just take a little  
23 break.  
24 (Recess at 10:08 a.m.)  
25 (Reconvened at 10:10 a.m.)

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1 it says 5/4/10. Then the very next entry, that says  
2 5/4/10 it says Alison Brandt, \$1,500. Are those the  
3 entries you are referring to?  
4 A. Yes, sir.  
5 Q. Okay, and can you find on the materials you  
6 provided to me, that is, the Wells Fargo checking  
7 account statements, or the bank statements, where that  
8 money is drawn out of the Wells Fargo account?  
9 A. I can't at this moment, but I believe my  
10 attorney, Karin Seubert, is looking for that  
11 information.  
12 MR. AHERIN: If she looks for that information  
13 those worksheets we were just looking at, can we have  
14 your office make a copy? I haven't seen them.  
15 MR. CREASON: I haven't either. We will get  
16 copies of the worksheets, yeah.  
17 A. Thank you. I can't locate it at this time.  
18 Q. (By Mr. Creason) It always pleases me to ask  
19 a bank teller to understand a bank statement and have  
20 them do what you're doing right now.  
21 A. Yes, sir. Yes, sir.  
22 Q. If you will please give me the folder you  
23 have and tell me a little bit about those records that  
24 you just -- you've showed me a page of it. It looks  
25 like worksheets, spreadsheets.

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1 Q. (By Mr. Creason) During our break,  
2 Ms. Johnson, you've had a chance to go back through  
3 some of your accounting records and the records that  
4 you've provided to me in relation to the question that  
5 I asked you about the payment or the retainer for  
6 Alison Brandt. Were you able to locate some  
7 information that will help us understand how she was  
8 paid and how much she was paid from the Trust?  
9 A. Yes, sir.  
10 Q. Okay, and where did you look to find this  
11 record?  
12 A. That was on a previous accounting that I  
13 wrote down information on a piece of paper.  
14 Q. Okay. Do you have that piece of paper with  
15 you?  
16 A. I do, sir.  
17 Q. All right. Would you let me take a look at  
18 that, please.  
19 A. May I go ahead and point it out to you?  
20 Q. Yes.  
21 A. Right here (indicating.)  
22 Q. Okay. You've pointed out to me an entry on  
23 a, looks like, a work paper, accounting spreadsheet, a  
24 cashier's check number 0585904902 Alison Brandt,  
25 Attorney \$125, and then in the column marked utilities

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1 A. Okay, I'd be happy to. Please excuse me for  
2 a moment.  
3 Q. Sure.  
4 A. There you are.  
5 Q. All right. You've handed me four sheets.  
6 A. Yes, sir.  
7 Q. They look like spreadsheets. Is that what  
8 you would call these?  
9 A. I believe so, sir.  
10 Q. All right. Tell me what those are. Are  
11 those your records?  
12 A. Yes, sir.



**ALISON M. BRANDT**  
**ATTORNEY AT LAW**

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320 Michigan Avenue  
P.O. Box 2482  
Orofino, Idaho 83544  
Phone (208) 476-7212  
Fax (208) 476-4642

April 26, 2010

John Cornell  
339 W. Highway 30  
Burley, Idaho 83318

Re: Michael S. Cornell and Arlie M. Cornell Revocable Trust

Dear John:

Please accept my condolences on the loss of your father. He was a very kind man and I am sure he will be greatly missed.

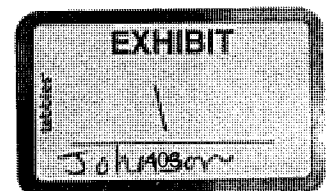
I met with your sister, Ms. Toni Johnson, regarding the distribution of the Michael S. Cornell and Arlie M. Cornell Revocable Trust before I received your message. As you know, Ms. Johnson is the Successor Trustee of your parents' trust and you and Ms. Johnson are the sole beneficiaries.

Ms. Johnson is fully aware that she has a fiduciary obligation to the trust estate. Trustees must ensure that trust assets are managed appropriately while trust administration takes place. This means that assets cannot be wasted, trust debts must be paid, and assets will be distributed to the beneficiaries as practicably as possible considering all circumstances.

It is my understanding that the main asset of your parents' trust is the real property and that this real property will need to be sold. The real estate market from a seller's standpoint in Orofino is not good. There was a time when homes such as your parents' were selling for very high prices but that is no longer the case.

In any event, Ms. Johnson will be speaking with a realtor and placing the home on the market. I anticipate that a sale, for a reasonable price, will not occur quickly. Hopefully, I am wrong.

While we wait for a buyer for the home there are many monthly expenses associated with the subdivision in which your parents' home is located that Ms. Johnson will need to pay from the trust bank account funds. She will further use the funds minimally to do any necessary small repairs that the realtor may suggest to improve the home's sale potential.



Currently, Ms. Johnson feels pressure from you to liquidate the assets of the trust and disperse the money immediately. Due to circumstances at this time, Ms. Johnson cannot fulfill her fiduciary obligation as Successor Trustee and liquidate the assets as you wish. Undue pressure and profanity from you will only further strain your relationship and may cause Ms. Johnson to seek a restraining order from the court to stop any and all harassment on your part.

Please be advised that Ms. Johnson is doing everything she can to get the trust assets distributed as quickly as possible, all within her responsibilities and obligations as set forth in the Idaho Statutes.

Ms. Johnson would prefer that your communication be through me, so if you would like to be updated on her progress please do not hesitate to write to me and advise me of such. I can let you know what price the realtor suggests to place on your parents' home. if there are offers on the home, and how trust assets, if any, are being distributed to help pay the real property expenses, etc.

Sincerely,

A handwritten signature in black ink, appearing to read 'Alison Brandt', with a long horizontal flourish extending to the right.

Alison Brandt

Cc: Ms. Toni Johnson

1 deciding who wanted what. I don't recall what the date  
2 was on that.  
3 Q. Okay. So, that was perhaps in the carload of  
4 things?  
5 A. Yes.  
6 Q. Did you part on good terms back in February  
7 of 2010?  
8 A. Uhm, I really can't say one way or the other.  
9 Q. Okay. We don't have an Exhibit No. 11, but  
10 I've already premarked this as No. 12, so I'll show you  
11 Exhibit No. 12 and ask you if you've seen that document  
12 before?  
13 A. Okay. I don't recall seeing this.  
14 Q. Do you know what that is?  
15 A. It says on here: Revocable Family Trust of  
16 Michael S. Cornell and Arlie M. Cornell.  
17 Q. Is that the Trust which you are the Trustee?  
18 A. Uhm, I don't know, unless it says on here  
19 directly. All I can say is I haven't seen it before.  
20 Q. Why don't you look at it in connection with  
21 Exhibit No. 6 that is there by the Reporter.  
22 A. Okay. Thank you.  
23 Q. Why don't you also look at No. 8 right along  
24 side that and look at No. 7 as well.  
25 A. Thank you.

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1 Q. Okay. Have you inventoried the private  
2 papers of your parents that are in the house; in other  
3 words, have you gone through there and looked at them?  
4 A. To be honest, it is a lot of junk as far as  
5 just old receipts and stuff laying around. I haven't  
6 seen anything substantial, but I haven't sat down and  
7 gone through every single paper.  
8 Q. Is there a safe or some other place where  
9 they kept important papers?  
10 A. No, sir.  
11 Q. Safe deposit box?  
12 A. No, sir.  
13 Q. Did your parents or someone on their behalf  
14 share with you where they kept their important papers?  
15 A. No, sir.  
16 Q. Okay. Would you do a thorough search of the  
17 papers and if you have some doubt about their  
18 importance; in fact, if they are papers that pertain to  
19 your parents or your parents' property would you review  
20 them with your legal counsel?  
21 A. Sure. May I write that down, please.  
22 Q. Yeah.  
23 MS. SEUBERT: I will write it down.  
24 A. Okay. Thank you.  
25 Q. (By Mr. Creason) What's the basis of your

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1 Q. Now, I think in answering questions that I've  
2 posed to you in the last couple hours you've told me  
3 successively that you don't believe you had seen any of  
4 these documents before. Is that still your testimony?  
5 A. The only one right now that I recall seeing,  
6 I think -- I believe this is the one that I saw  
7 (handing paper to Mr. Creason.)  
8 Q. You believe you saw No. 6?  
9 A. Yes, sir.  
10 Q. Is that the one you thought was your in  
11 brother's hand or your dad's hand when they came back  
12 from Alison Brandt's?  
13 A. That is correct.  
14 Q. And that's No. 6, okay. So, would it be fair  
15 to say that you did not and have not until today seen  
16 the documents that empower you to act as a Trustee for  
17 the Revocable Family Trust of Michael S. Cornell and  
18 Arlie M. Cornell?  
19 A. I don't recall seeing those documents.  
20 Q. Did your parents have a Will, to your  
21 knowledge?  
22 A. I believe they did. If so, I don't know  
23 where they are right now.  
24 Q. Would they be in the house?  
25 A. If they are there they would be.

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1 disability for Social Security benefits?  
2 A. Well, initially what happened -- I don't know  
3 really how to explain it. Could you repeat the  
4 question again, please?  
5 Q. My understanding is there is a pending claim  
6 for Social Security Disability that you made?  
7 A. Right, right, right.  
8 Q. I think you called it SSI?  
9 A. Correct.  
10 Q. Perhaps you mean something else. I don't  
11 know.  
12 A. Okay.  
13 Q. But what causes you to believe that you may  
14 be entitled to those benefits?  
15 A. Okay. At the time that it was applied for me  
16 I was extremely ill. I had a duodenal ulcer that was  
17 large, and it perforated my bowel and blew out my  
18 bowel. And at that time I had congestive heart failure  
19 and numerous other things, and I've improved but --  
20 Q. When was that?  
21 A. That was January 20th of this year.  
22 Q. I see. So, it's just been in the last few  
23 months?  
24 A. Yes, sir.  
25 Q. Is the house currently listed?

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REVOCABLE FAMILY TRUST  
OF

MICHAEL S. CORNELL

AND

ARLIE M. CORNELL

MICHAEL S. CORNELL and ARLIE M. CORNELL, husband and wife, residents of the State of California, County of Orange, desire to set forth a Trust upon the conditions and for the purposes hereafter set forth. This Trust will be known as the "MICHAEL S. CORNELL AND ARLIE M. CORNELL REVOCABLE TRUST DATED Nov. 1, 1996."

ARTICLE ONE

Section 1.01 Trust Estate

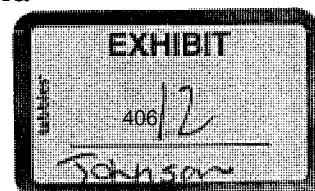
All property hereafter transferred or conveyed to and received by the Trustee to be held pursuant to the terms of this instrument is herein called the "Trust Estate" and shall be held, administered, and distributed by the Trustee as provided in this Declaration of Trust.

Section 1.02 Meaning of Words

- a) The term "Husband" shall mean MICHAEL S. CORNELL;
- b) The term "Wife" shall mean ARLIE M. CORNELL;
- c) The term "Trustor" shall refer individually and collectively to Husband and Wife.

Section 1.03 Trustee Designation

Husband and Wife are hereby designated as Co-Trustees of all trusts created by or to be created pursuant to this Declaration of Trust. Should either Husband or Wife become unable because of death, incapacity or other cause, to serve as such a Co-Trustee, or should either resign as such a Co-Trustee, before the natural termination of all trusts provided for in this Declaration, the remaining Co-Trustee, Husband or Wife, shall thereafter serve as sole Trustee as provided in this Declaration. The term "Trustee" as used in this Declaration shall refer collectively to Husband



and Wife so long as they shall serve as such Co-Trustees and thereafter to such of them as may serve as sole Trustee. This paragraph is subject to Section 9.01.

#### Section 1.04 Additions to Trust Properties

a) At any time during the continuance of any trust hereunder, its Trustees, in their sole discretion after consideration of the possible tax consequences thereof to all concerned, is authorized to receive additions of cash or other properties to such trust, subject to any conditions to which such Trustees may agree, from any source whatsoever without limitation, whether by gift, will, or otherwise. However, the Trustees shall accept all assets which any person or persons may give, devise, and/or bequeath by last will and testament to any trust or trusts hereunder as well as all assets which may be transferred to such trust or trusts pursuant to the express provisions of any other trust document or documents of any kind.

b) Furthermore, at any time any person or persons may designate any trust hereunder as the beneficiary, primary or contingent, of any insurance, pension, or other death benefit, relating to the life of anyone (such designation to be presumed to be revocable unless it is expressly irrevocable) and, until such benefit matures by reason of death, the Trustees shall have no responsibility whatsoever with respect thereto, it being intended that, unless and until the trust which is the designated beneficiary of such death benefit becomes the owner of the insurance proceeds as actually become payable by reason of death.

c) All additions, unless specifically designated to a certain trust or trusts hereunder or unless there is only one trust then in existence hereunder, shall be considered as made to the Trust as hereinafter defined. Any addition, including any income earned thereon prior to actual receipt of the addition by the trust, shall be added to the corpus of such trust and thereafter held, managed, and distributed by its Trustees as a part of the corpus to which the same is added.

#### Section 1.05 Separate Property to Remain Separate

All property now or hereafter conveyed or transferred to the Trustee to be held by the Trustee pursuant to this Declaration which was community property, quasi-community property, or separate property at the time of such conveyance or transfer, shall remain, respectively, community property, quasi-community property, or the separate property of the Trustor transferring such property to the Trustee.

When separate property is held in the Trust, it may be withdrawn from the Trust on the sole signature of the Trustor who put it in the Trust. This applies to real property, as well as personal property.

## Section 1.06 Amendment and Revocation

At any time during the joint lives of the Trustors, jointly as to Community Property and individually as to his or her own separate property, Trustors may, by a duly executed instrument;

a) Amend this trust agreement (including its technical provisions) in any manner and/or

b) Revoke this trust agreement in part or in whole, in which latter event any and all trust properties shall forthwith revert to such Trustor free of trust. Such instrument of amendment or revocation shall be effective immediately upon its proper execution by Trustor(s), but until a copy has been received by a trustee, that Trustee shall not incur any liability or responsibility either (i) for failing to act in accordance with such instrument or (ii) for acting in accordance with the provisions of this trust agreement without regard to such instrument.

## ARTICLE TWO

### Section 2.01 Trust Income

During the joint lives of the Trustors, the Trustee shall at least annually unless otherwise directed by both Trustors in writing, pay to or apply for the benefit of Husband and Wife, all of the net income from the Trust Estate in the same proportion as each of their respective interests in the Trust Estate.

### Section 2.02 Protection of Trustor in Event of Incapacity

During the joint lives of the Trustors, should either Trustor become incapacitated as defined in Section 2.03 below, the Trustee may, in the Trustee's discretion;

a) Pay the entire net income of the Trust Estate in monthly or other convenient installments to the remaining competent Trustor; or

b) Apply such portion of the net income, up to the whole thereof, of the Trust Estate as the Trustee may deem in his absolute discretion reasonable and proper for the benefit of the Trustor so adjudged to be incompetent or unable to manage his or her own affairs; or

c) Declare void and without effect, any attempt by the Trustor to exercise the reserved rights of revocation, amendment, withdrawal of assets, control over Trustees, etc., unless a court of competent jurisdiction determines otherwise or Trustor's

disappearance constitutes incapacity. During any period of either Trustor's incapacity, this Trust is irrevocable and unamendable. As Trustors do not intend that any taxable gift be deemed made by reason of such irrevocability, it is expressly provided that, notwithstanding the foregoing, Trustors shall at all times have the power to appoint to any person, designated in any way in this agreement as a vested or contingent beneficiary, any and all assets contained in this trust at the time of Trustor's death, said power being exercisable, however, only by specific reference to said power in Trustor's will duly provided for probate.

### Section 2.03 Incapacity

In the event that any Trustee or any beneficiary hereunder comes into possession of any of the following:

- a) A court order, which such Trustee or beneficiary deems to be jurisdictionally proper and still concurrently applicable, holding a person to be legally incapacitated to act in his or her own behalf or appointing a guardian to act for him or her, or
- b) Duly executed, witnessed, acknowledged written certificates, at least one of which is then unrevoked, of two licensed physicians (each of whom represents that he or she is certified by a recognized medical board), each certifying that such physician has examined a person and has concluded that, by reason of accident, or mental deterioration, or similar cause, such person had, at the date thereof, become incapacitated to act rationally and prudently in his or her own financial best interests, or
- c) Evidence which such Trustee or beneficiary deems to be creditable and still currently applicable that a person has disappeared, is unaccountably absent, or is being detained under duress where he or she is unable effectively and prudently to look after his or her own interests.

Then, in that event and under those circumstances:

- a) Such person shall be deemed to have thereupon become incapacitated, as that term is used in and for all of the purposes of this instrument, and
- b) Such incapacity shall be deemed to continue until such court order, certificates, and/or circumstances have become inapplicable or have been revoked, and
- c) The named successor trustee shall immediately become the Trustee, acting with all the rights and powers described herein.

Any physician's aforesaid certificate may be revoked by a similar certificate to the effect that such person is no longer thus incapacitated, executed either by (i) the original certifying



physician or (ii) two other licensed, board certified physicians. No Trustee shall be under any duty to institute any inquiry into a person's possible incapacity, but the expense of any such inquiry reasonably instituted may be paid from trust assets. Payment for said inquiry refers both to a reasonable inquiry as to the incapacity of such individual and to that inquiry as to the revocation of such a Certificate.

#### Section 2.04 Protection in the Event of Catastrophic Illness

If both Trustors are living and a catastrophic illness affects one of the Trustors, then the remaining Trustor may divide the Trust assets in such a way as to qualify the infirm Trustor for state assistance payments and may remove the infirm Trustor as a Trustee of this Trust. A catastrophic illness is one which is reasonably anticipated to extend for a period of six (6) months or longer, and which renders the affected Trustor incompetent or in need of full time care. If competent, a Trustor may make the determination to divide the Trust Estate in accordance with these provisions. If the Trustor affected by the catastrophic illness is not competent to manage his or her affairs, then the division shall be made by the person designated as the affected Trustor's attorney-in-fact in his or her durable power of attorney, or by a court appointed conservator of the affected Trustor.

From and after the division of the Trust assets, the share of the Trust Estate set aside for each Trustor shall be his or her sole and separate property for all purposes, and if that property remains part of the Trust Estate, subject to the terms and conditions set forth within this trust agreement. The Trustor who is not infirm may use assets of the infirm Trustor to purchase an annuity or other assets which do not disqualify the infirm Trustor from state assistance.

#### Section 2.05 Principal Invasion

During the joint lives of the Trustors, should the net income of the Trust Estate be insufficient to provide for the care, maintenance or support of the Trustors as herein defined, the Trustee may, in the Trustee's absolute discretion, pay to or apply for the benefit of the Trustors, or either of them, or any of their dependents, such amounts from the principal of the Trust Estate as the Trustee may, in the Trustee's absolute discretion, from time to time deem necessary or advisable for the care, maintenance or support of the Trustors. As used in this section, the term "care, maintenance or support of the Trustors" shall mean:

- a) The providing of proper care, maintenance and support for the Trustors, or either of them, during any period of illness, or other want or necessity;

b) The maintenance of the Trustors, and each of them, in the manner of living to which they, and each of them, are accustomed on the date of this Declaration;

c) The support and maintenance in the manner in which they are accustomed on the date of this Declaration whether adult or minor, dependent on the Trustors, or either of them, for such support and maintenance; and

d) The education in the manner desired by the Trustors of any person, whether adult or minor, dependent on the Trustors, or either of them, for such education.

### ARTICLE THREE

#### Section 3.01 Provisions After First Death

On the death of either Trustor, leaving the other Trustor surviving him or her, the then Trustee shall collect all insurance proceeds payable to the Trustee by reason of such death, all bequests and devises distributable to the Trust Estate under the terms of the Last Will and Testament of the deceased Trustor and convey the assets according to the instructions set forth herein. The Trustee may use all income and principal for the benefit of the surviving Trustor.

#### Section 3.02 Last Expenses

On the death of the first of the Trustors to die, the Trust shall pay either from the income or principal of the Trust as the Trustee in the Trustee's absolute discretion may determine, the expenses of the deceased Trustor's last illness, funeral, burial and any inheritance, estate or death taxes that may be due by reason of the deceased Trustor's death, unless that Trustee in his or her absolute discretion determines that other adequate provisions have been made for the payment of such expenses and taxes.

#### Section 3.03 Surviving Spouse

The Trustee shall hold, administer and distribute all Trust assets for the benefit of the surviving spouse, both as to income and principal, unless otherwise herein provided.

### ARTICLE FOUR

#### Section 4.01 Second Death

On the death of the Trustor last to die, herein called "Surviving Trustor", the principal of the Trust and any accrued or undistributed net income from the Trust shall go to the successor

Trustee and the Trustee shall apply and distribute the net income and principal of the Trust Estate as set forth herein.

#### Section 4.02 Payment of the Second Death Expenses

On the death of the surviving Trustor, the Trustee shall pay either from the income or principal of the Trust or partly from the income and partly from the principal of the Trust, as the Trustee in his or her absolute discretion may determine, the expenses of the Surviving Trustor's last illness, funeral, burial and any inheritance, estate or death taxes that may be due by reason of the inclusion of any portion of the Trust Estate in the Surviving Trustor's estate for the purposes of any such tax, unless the Trustee in his or her absolute discretion determines that other adequate provisions have been made for the payment of such expenses and taxes.

#### Section 4.03 Trust Income and Principal Distribution

On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two(2) equal shares and distribute them to the following beneficiaries:

TONI C. JOHNSON and JOHN H. CORNELL

a) If any child, for whom a share of the Trust Estate has been set aside, should die prior to the above distribution, then the Trustee shall distribute all of such deceased child's share of the Trust Estate to his or her surviving issue in equal shares. If any issue are minors, the funds from the Trust Estate shall be held in a bank, savings and loan or money market fund and used for their care, welfare and college education. Any funds remaining shall be distributed at age 25. If there is no surviving issue, then all of the deceased child's share of the Trust Estate shall be added to the shares set aside for the benefit of the Trustors' other living child, as hereinabove provided, including proportionately both the distributed and the undistributed portions of each such share, to be distributed as an equal part of such other shares.

b) If all of the Trustors' beneficiaries outlined above should die prior to final distribution of the Trust Estate, all of the Trust Estate not disposed of as hereinabove provided shall be distributed one-half (1/2) to the persons who would then be the husband's heirs and the other one-half (1/2) to the persons who would then be the heirs of the wife. The identities and respective shares of the aforesaid heirs to be determined in accordance with the intestate succession laws of the State of

California then in effect relating to the succession of separate property not acquired from a predeceased spouse. If either of the Trustors have no such heirs, then all of the Trust estate shall be distributed to the aforesaid heirs of the other Trustor.

#### Section 4.04 Trust Termination

Unless sooner terminated as otherwise provided herein, all of the trusts provided for herein shall terminate on the death of the survivor of the Trustors and their children living at the date that any of the trusts created hereunder first becomes irrevocable.

#### Section 4.05 Simultaneous Death

Should both Trustors die simultaneously or under any circumstances rendering it difficult or impossible to determine which Trustor predeceased the other, each Trustor shall, for the purpose of disposing of his separate property be deemed to have predeceased the other Trustor.

### ARTICLE FIVE

#### Section 5.01 Non-Income Producing Property

(Clearly residence is non-income producing)

During the lives of either of the Trustors, the Trustee is authorized to retain in the trusts provided for in this Declaration, for so long as the Trustee may deem advisable and in the best interest of such trusts, any property received by the Trustee from the Trustors, or either of them, whether or not such property is of the character permitted by law for the investment of trust funds. After the death of the last Trustor to die, the Successor Trustee may retain any such property in the trust provided for in this Declaration only so long as such property is productive of income, (subject to Section 5.08 of Article 5 herein).

#### Section 5.02 Trustee Powers

The Trustee shall, with respect to any and all property which may at any time be held by the Trustee in trust pursuant to this Declaration, whether such property constitutes principal or accumulated income of any trust provided for in this Declaration, have power, exercisable in the Trustee's absolute discretion at any time and from time to time on such terms and in such manner as the Trustee may deem advisable to:

a) Sell, convey, exchange, convert, improve, repair, partition, divide, allot, subdivide, create restrictions, easements, or other servitudes thereon, operate and control;

b) Lease for terms within or beyond the term of any trust provided for in this Declaration and for any purpose, including exploration for and removal of gas, oil and other minerals; and enter into any covenants and agreements relating to the property so leased or any improvements which may then or thereafter be erected on such property;

c) Encumber or hypothecate for any trust purpose by mortgage, deed of trust, pledge or otherwise;

d) Carry insurance of such kinds and in such amounts at the expense of the trusts provided for in this Declaration as the Trustee may deem advisable;

e) Commence or defend at the expense of any trust provided for in this Declaration such litigation with respect to any such trust or any property of the Trust Estate as Trustee may deem advisable and employ, for reasonable compensation payable by any such trust, such counsel as the Trustee shall deem advisable for that purpose;

f) So long as the original trustee or trustees are managing the Trust, they may invest and reinvest in common or preferred stocks, securities, investment trusts, bonds and other property, real or personal, foreign or domestic, including any undivided interest in any one or more common trust funds, whether or not such investments be of the character permissible for investments by fiduciaries under any applicable law, and without regard to the effect any such investment may have upon the diversification of investments. Trustees are specifically authorized to invest in Mutual Funds, Limited Partnerships, option accounts (covered or not), including, but not limited to, Currency, Index, Stocks, Futures, Commodities, Precious Metals, etc., traded on the Chicago Board of Trade or other nationally recognized Boards of Trade. Trustees expressly have the authority to trade on margin.

g) Vote, by proxy or otherwise, in such manner as Trustee may determine to be in the best interests of the trust provided for in this Declaration, any securities having voting rights held by the Trustee pursuant to this Declaration;

h) Pay any assessments or other charges levied on any stock or other security held by the Trustee in trust pursuant to this Declaration;

i) Exercise or not exercise, as Trustee may deem best, any subscription, conversion or other rights or options which may at any time attach, belong or be given instruments held by it in trust pursuant to this Declaration;

j) Participate in any plans or proceedings for the foreclosure, reorganization, consolidation, merger or liquidation of any corporation or organization that has issued securities held by the Trustee, or will issue securities to be held by Trustee in

trust pursuant to the terms of this Declaration, to deposit securities with and transfer title or securities on such terms as Trustee may deem in the best interest of the trusts to any protective or other committee established to further or defeat any such plan or proceeding;

k) Enforce any mortgage or deed of trust or pledge held by Trustee in trust pursuant to this Declaration and at any sale under any such mortgage, deed of trust or pledge, to bid and purchase at the expense of any trust provided for in this Declaration, any property subject to such security instrument;

l) Compromise, submit to arbitration, release with or without consideration and otherwise adjust any claims in favor of or against any trust provided for in this Declaration;

m) Distribute gifts of up to \$10,000.00 per year per donee out of principal or interest or in any proportion of the two that the Trustee, in his sole discretion, deems advisable;

n) Invest in and guarantee a business or Trustee of the Trust capitalizing on the business venture;

o) Subject to any limitations expressly set forth in this Declaration and faithful performance of Trustee's fiduciary obligations, to do all such acts, take all such proceedings, and exercise all such rights and privileges as could be done, taken or exercised by an absolute owner of the trust property; and

p) So long as both of the original Trustees are serving as Trustees hereunder, either of them shall have the power to bind the trust in any and all transactions, including, but not limited to (1) collecting receipts; (2) paying disbursements; (3) securing assets; (4) writing checks and making withdrawals from bank accounts; (5) purchasing, selling and pledging securities and other property; and (6) exercising any power conferred on the Trustees pursuant to the terms of this Declaration of Trust, and the action of either original Trustee may be relied upon by third parties dealing with those Trustees or either of them.

q) The trustee is empowered to buy; sell, trade and deal in options, precious metals, stocks, bonds and securities of all nature (including "short" sales and speculative option transactions - i.e. uncovered puts and calls, option spreads, option straddles, and option combinations) and commodities of every nature, and contracts for the future delivery of commodities of every nature on margin and otherwise; and for such purpose to maintain and operate margin and commodity accounts with brokers; and in connection therewith to borrow money and to pledge any and all stocks, bonds, securities, commodities and contracts for the future delivery thereof, held or purchased by the trustee, with such brokers as securities for loans and advances made to the trustee.

r) The successor trustee has the authority to enter the safe deposit box in Trustors' names, individually or as Trustees of the Trust, and remove the contents thereof.

#### Section 5.03 Power to Borrow

The Trustee shall have the power to borrow money for any trust purpose (including from the probate estate for the purpose of paying taxes) on such terms and conditions as the Trustee may deem proper from any person, firm or corporation, including the power to borrow money on behalf of one trust from any other trust provided for in this Declaration, and to obligate the trusts, or any of them, provided for in this Declaration to repay such borrowed money.

#### Section 5.04 Power To Loan to Trusts

The Trustee is authorized to loan or advance Trustee's own funds to any trust provided for in this Declaration for any trust purpose and to charge for such loan or advance the rate of interest that Trustee, at the time such loan or advance is made, would have charged had such loan or advance been made to a person not connected with such trusts having a net worth equal to the value of the principal of such trust. Any such loan or advance, together with the interest accruing on such loan or advance, shall be a first lien against the principal of the Trust to which such loan or advance is made and shall be repaid from the income or principal of such trust as in the discretion of the Trustee appears for the best interest of such trust and its beneficiaries.

#### Section 5.05 Purchase of Securities

The Trustee is authorized to purchase securities or other property from and to make loans and advancements from the Probate Estate with or without security to the executor or other representative of the estate of either Trustor.

#### Section 5.06 Manner of Holding Title

The Trustee may hold securities or other property held by Trustee in trust pursuant to this Declaration in Trustee's name as Trustee under this Declaration, in Trustee's own name without a designation showing it to be Trustee under this Declaration, in the name of Trustee's nominee, or the Trustee may hold such securities unregistered in such condition that ownership will pass by delivery.

#### Section 5.07 Expense and Proceeds Allocation

Except as otherwise specifically provided in this Declaration, the Trustee shall allocate all receipts and expenditures received



or incurred by Trustee in administering the trusts provided for in this Declaration to the income or principal of each such trust in the manner provided in this Declaration to the income or principal of each such trust in the manner provided by the Revised Uniform Principle and Income Act in effect on the date of this Declaration in the State of California.

#### Section 5.08 Trustors' Residence

After the death of the first Trustor to die, the Trustee is authorized to retain in any trust or trusts provided for in this Declaration for the personal use of the Surviving Trustor any property occupied by the Trustors as their principle place of residence at the time of death of the first Trustor to die for so long as the Surviving Trustor may desire to occupy such residence property. During such retention, the Trustee shall pay, from either the income or principal of the trust provided for in this Declaration as the Trustee may deem in the best interests of such trusts and their beneficiaries, all taxes and assessments levied or assessed against such property and all costs of keeping such property properly insured, maintained and repaired. Surviving Trustor shall not be obligated for payment of rent. On written request of the Surviving Trustor, the Trustee may sell such property and replace it with other property, to be retained in trust in the same manner as the replaced residence property, suitable in the Trustee's judgment as a residence for the Surviving Trustor.

### ARTICLE SIX

#### Section 6.01 Coordination with Trustor's Probate Estate

a) At any time during the continuance of the original trust hereunder and after the first Trustor's death, its Trustees may distribute to the deceased Trustor's probate estate, as a beneficiary of such trust, cash and/or other property out of any assets then held by such trust, including any which are classified as postdeath trust income, to whatever extent such Trustees, in their sole and uncontrolled discretion, deem advisable in the best interest of Trustor's beneficiaries generally.

b) To relieve Trustor's probate estate from the burden of paying them, any estate, inheritance, succession, or other similar death taxes which may be imposed as a result of Trustor's death, as well as funeral, last illness, and administrative expense, debts, and other proper charges against Trustor's estate, may at any time be paid out of any assets then held by the original trust hereunder, including any which are classified as postdeath trust income, to whatever extent the Trustees of the original Trust hereunder, in their sole and uncontrolled

discretion, deem advisable and in the best interest of the Trustor's beneficiaries generally.

c) All other provisions hereof to the contrary notwithstanding, under no circumstances shall any restricted proceeds, as hereinafter defined, be either directly or indirectly (i) distributed to or for the benefit of Trustor's executors or Trustor's probate estate or (ii) used to pay any obligations of Trustor's estate. The term "restricted proceeds" means:

1) All qualified plans, individual retirement accounts, or similar benefits which are received or receivable by any Trustee hereunder which, if paid solely to a beneficiary "other than the executor" of the Trustor's estate, would be excluded from Trustor's gross estate for federal estate tax purposes under Section 2039 of the Internal Revenue Code in effect at Trustor's death; and

2) All proceeds of insurance on Trustor's life which, if paid to a beneficiary other than Trustor's estate, would be exempt from inheritance or similar death taxes under applicable state death tax laws.

However, the term "restricted proceeds" shall not include any qualified plan or similar death benefits which would not in fact be excluded from Trustor's gross estate under the applicable subsection of Section 2039 even though such benefits were receivable by a beneficiary other than Trustor's executor nor shall it include any life insurance proceeds which would be subject to no greater state or federal death tax should this restriction not exist.

#### Section 6.02 Direction to Minimize Taxes

In the administration of the trust hereunder, its fiduciaries shall exercise all tax related elections, options, and choices which they have, in such manner as they in their sole but reasonable judgment (where appropriate, receiving advice of tax counsel), believe will achieve the overall minimum in total combined present and reasonably anticipated (but appropriately discounted) future administrative expenses and taxes of all kinds, upon not only such trust, but also its beneficiaries, the other trusts hereunder and their beneficiaries and Trustor's probate estate. Without limitation on the generality of the foregoing direction (which shall to that extent supersede the usual fiduciary duty of impartiality), such fiduciaries shall not be accountable to any person interested in any trust or in Trustor's estate for the manner in which they shall carry out this direction to minimize overall taxes and expenses (including any decision they may make not to incur the expense of detailed analysis of alternative choices) and, even though their decisions in this regard may result in increased tax or decreased distribution to a trust, to the estate, or to one or more beneficiaries, there shall in no event be any compensation

readjustments or reimbursements between any of the trusts hereunder or any of the trust or estate accounts or beneficiaries by reason of the manner in which the fiduciaries thus carry out said direction.

## ARTICLE SEVEN

### Section 7.01 Incontestability

The beneficial provisions of this instrument (and of Trustor's Last Will and Testament) are intended to be in lieu of any other rights, claims, or interest of whatsoever nature, whether statutory or otherwise, except bona fide pre-death debts, which any beneficiary hereunder may have against or in Trustor's estate or the properties in trust hereunder. Accordingly, if any beneficiary hereunder asserts any claim (except a legally enforceable debt), statutory election, or other right or interest against or in Trustor's estate, Trustor's Will, or any properties of this Trust, other than pursuant to the express terms hereof or of said Will, or directly or indirectly contests, disputes, or calls into question, before any court, the validity of any provisions of this instrument or of said Will, then:

- a) Such beneficiary shall thereby absolutely forfeit any and all beneficiary interests of whatsoever kind and nature which such beneficiary might otherwise have under this instrument and the interests of the other beneficiaries shall be proportionately increased and/or advanced;
- b) All of the provisions of this instrument, to the extent that they confer any benefits, powers, or right whatsoever upon such claiming, electing, or contesting beneficiary, shall thereupon become absolutely void and revoked; and
- c) Such claiming, electing, or contesting beneficiary, if then acting as a Trustee hereunder, shall automatically cease to be a Trustee and shall thereafter be ineligible either to select, remove or become a Trustee hereunder.

The foregoing shall not be construed, however, to limit the appearance of any beneficiary as a witness in any proceeding involving this instrument or said Will nor to limit any beneficiary's appearance in any capacity in any proceeding solely for the construction of either of said documents.

## ARTICLE EIGHT

### Section 8.01 Accrued Income on Termination of Beneficial Interest

Whenever the right of any beneficiary to payments from the net income or principal of any trust provided for in this Declaration shall terminate either by reason of death or other cause, any accrued net income from such trust undistributed by the Trustee on the date of such termination shall be held, administered and distributed by the Trustee in the same manner as if such income had accrued and been received by the Trustee after the date such beneficiary's right to receive payments from such trust terminated.

### Section 8.02 Periodic Accountings

A Trustee shall be entitled to pay himself reasonable compensation from time to time without prior court order and shall be reimbursed for all out-of-pocket expenses incurred in administering the Trust.

During the lifetime of either Trustor, the Trustees shall account only to the Settlers or the survivor of them, and their written approval shall be final and conclusive in respect to transactions disclosed in the account as to all beneficiaries of the trust, including unborn and contingent beneficiaries. After the deaths of both Trustors, the Trustees shall render an accounting from time to time but not less frequently than annually after any prior accounting regarding the transactions of any trust created in this instrument.

Accountings shall be made by delivering a written accounting to each beneficiary entitled to current income distribution, or if there are no current income beneficiaries, to each beneficiary entitled to current distribution out of income or principal in the Trustees' discretion. If any person entitled to receive an accounting is a minor or is under a disability, the accounting shall be delivered to his parents or the guardian of his person if he is a minor or to the guardian or conservator of his person if he is under any other disability. Unless any beneficiary, including parents, guardians or conservators of beneficiaries, shall deliver a written objection to the Trustees within sixty (60) days after receipt of the Trustees' account, the account shall be final and conclusive in respect to the transactions disclosed in the account as to all beneficiaries of the trust including unborn and unascertained beneficiaries. After settlement of the account by agreement of the parties objecting to it or by the expiration of the sixty (60) day period, the Trustees shall no longer be liable to any beneficiary of the trust including unborn and unascertained beneficiaries, in respect to transactions disclosed in the account, except for the Trustees' intentional wrongdoing or fraud.

### Section 8.03 Spendthrift Provision

Except as otherwise expressly provided in this Declaration, no beneficiary of any trust provided for in this Declaration shall have any right, power or authority to alienate, encumber or hypothecate his or her interest in the principal or income of such trust in any manner, nor shall such interest of any beneficiary be subject to claims of his or her creditors or liable to attachment, execution or other process of law.

### Section 8.04 Distribution in Kind or Cash

On any division of the assets of the Trust Estate into shares or partial shares and on any final or partial distribution of the assets of the Trust Estate or any trust provided for in this Declaration, the Trustee, in its absolute discretion, may divide and distribute such assets in kind, may divide or distribute undivided interests of such assets, or may sell all or any part of such assets and make division or distribution in cash or partly in cash and partly in kind. The decision of the Trustee, either prior to or on any division or distribution of such assets, as to what constitutes a proper division of such assets of the Trust Estate or any trust provided for in this Declaration shall be binding on all persons in any manner interested in any trust provided for in this Declaration.

### Section 8.05 Definition of Children

The terms "child" and "children" as used in this Trust shall mean the lawful issue of the Trustors or either of them and include children legally adopted by the Trustors or either of them.

## ARTICLE NINE

### Section 9.01 Trustees

The following will act as Trustees in the following order of succession:

FIRST: The undersigned, **MICHAEL S. CORNELL**, Husband and **ARLIE M. CORNELL**, Wife, together as co-trustees.

SECOND: At the death or incapacity of the last survivor of the undersigned, **TONI C. JOHNSON** and **JOHN H. CORNELL** shall act as Co-Trustees.

THIRD: A trustee chosen by the majority of beneficiaries, with a parent or legal guardian voting for minor beneficiaries; provided, however, that the issue of any deceased child shall have collectively only one vote.

## ARTICLE TEN

### Section 10.01 Perpetuities Savings Clause

In any event and anything to the contrary herein contained notwithstanding, the trusts created in this agreement shall terminate upon the day next preceding the expiration of twenty-one (21) years after the death of the undersigned and their issue now living. In the event these trusts shall not have previously terminated in accordance with the terms provided for in this paragraph, the Trustee shall distribute the Trust Estate as it shall then be constituted, together with any net income, to the beneficiaries then entitled to the income from the Trust Estate in the same proportions in which they are entitled to such income.

## ARTICLE ELEVEN

### Section 11.01 Governing Law

It is not intended that the laws of only one particular state shall necessarily govern all questions pertaining to all of the trusts hereunder. Rather;

a) The validity of the trust hereunder, as well as that validity of the particular provisions of that trust, shall be governed by the laws of whatever state having any sufficient connection with such trust will support such validity.

b) The meaning and effect of the terms of this trust instrument and of any other trust instrument related hereto shall be governed by the laws of the state in which the initial trust under that trust instrument was created, that is, California in the case of this instrument, and such other state as may be designated in the governing instrument of any trust receiving an appointment hereunder.

c) The administration of the trust hereunder shall be governed by the laws of the state in which that trust is then being administered (based on the location of the principal office of the Trustee then having custody of that Trust's principal assets and records), which state's courts shall have exclusive jurisdiction over that administration of the trust with respect to any period during which it was thus being administered in that state.

The foregoing shall apply even though the situs of some trust assets or the home of the Trustor, a trustee, or beneficiary may at some time or times be elsewhere.

Section 11.02 Invalidity of Any Provision

Should any provision of this Declaration be or become invalid or unenforceable, the remaining provisions of this Declaration shall be and continue to be fully effective.

Section 11.03 Successor Trustees

Any successor Trustee taking office pursuant to Article Nine of this Declaration shall forthwith succeed to all title of the prior Trustee and shall have all the power, rights, discretions and obligations conferred on such Trustee by this Declaration.

1. We, and each of us, have read the foregoing Declaration of Trust; The foregoing Declaration of Trust correctly states the terms and conditions under which the Trust Estate is to be held, managed, administered and disposed of by the Trustee;

2. We, and each of us, approve such Declaration of Trust in all particulars; and

3. As the Trustee named in such Declaration of Trust, we and each of us, approve and accept the trusts provided for in such Declaration.

EXECUTED ON THIS 1st DAY OF Nov., 1976, AT Santa Ana, CALIFORNIA.

BY: Michael S. Cornell TRUSTEE  
MICHAEL S. CORNELL

BY: Archie M. Cornell TRUSTEE  
ARLIE M. CORNELL

BY: Michael S. Cornell TRUSTOR  
MICHAEL S. CORNELL

BY: Archie M. Cornell TRUSTOR  
ARLIE M. CORNELL

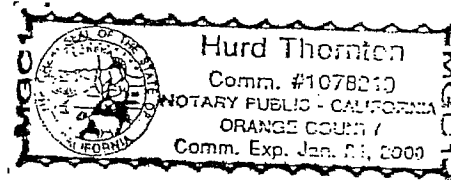


STATE OF CALIFORNIA )  
 )SS  
COUNTY OF Orange

ON 11-1-96, BEFORE ME, Hurd Thornton PERSONALLY  
APPEARED MICHAEL S. CORNELL AND ARLIE M. CORNELL X PERSONALLY KNOWN TO ME OR  
\_\_\_\_ PROVED TO ME ON THE BASIS OF SATISFACTORY EVIDENCE TO BE THE PERSONS WHOSE  
NAMES ARE SUBSCRIBED TO THE WITHIN INSTRUMENT, AND ACKNOWLEDGED THAT THEY EXECUTED  
THE SAME IN THEIR AUTHORIZED CAPACITIES, AND THAT BY THEIR SIGNATURES ON THE  
INSTRUMENT THE PERSONS, OR THE ENTITY UPON BEHALF OF WHICH THE PERSONS ACTED,  
EXECUTED THE INSTRUMENT.

WITNESS MY HAND AND OFFICIAL SEAL.

Hurd Thornton



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15 BY MR. CREASON:

16 Q. Have you made any other plans or do you have  
17 any other commitments from anyone to assist you with  
18 your cash needs in taking care of this Trust property  
19 if this house continues to languish on the market?

20 A. Yes, sir. I do have an aunt that is willing  
21 to assist me to some degree with that.

22 Q. And who is that?

23 A. Marlene Cunningham.

24 Q. And where does she reside?

25 A. Las Vegas, Nevada.

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 Attorneys for Personal Representative  
 Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:	)	Case No. CV 2012-00277
	)	
THE REVOCABLE FAMILY TRUST OF	)	<b>MEMORANDUM IN OPPOSITION</b>
MICHAEL S. CORNELL AND ARLIE M.	)	
CORNELL.	)	<b>RE: MOTION TO DISMISS</b>
	)	
	)	

**I. PRELIMINARY STATEMENT**

On March 6, 2013, the Estate of John Henry Cornell petitioned this Court to supervise administration of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell and order distribution of the Trust res. The Estate seeks (1) the return of real property placed by John Cornell in the Trust for safekeeping; and (2) the turnover of property which vested in John Cornell years before his death but was wrongly withheld from him. In order to receive the full amount actually due to John through distribution, the Estate also seeks a judgment against the trustee, Toni C. Johnson, for damage caused to the Trust res by her improper conduct. In other

words, not only does the Estate raise claims against the Trust for actions of the trustee, which John held at the time of his death, but the Estate also seeks the *return of property*, which belonged to John at the time of his death.

Ms. Johnson's motion to dismiss raises before this court the issue of whether an estate may pursue the property interests of the decedent where the decedent failed to recover the property due him during his lifetime. The Court should deny Ms. Johnson's motion because (1) the nature of Ms. Johnson's appearance and legal representation in this matter creates a genuine issue of material fact;<sup>1</sup> (2) the Estate is not precluded from pursuing its claims through the law of the case doctrine; (3) actions seeking to adjudicate property rights and order proper distribution of the subject property survive the death of the property owner; and (4) even if the Estate's claims do not survive at law, equity demands that Ms. Johnson not be allowed to retain her ill gotten gains which she acquired through refusing to engage in proper conduct.

## **II. FACTS & PROCEDURE**

Michael and Arlie Cornell established The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell on November 1, 1996. The Trust appointed Toni Johnson and John Cornell to serve as successor co-trustees upon the death of the surviving Trustor. Arlie Cornell died on November 9, 2008. After her death, the Trust instrument was changed by Michael Cornell on August 6, 2009, removing John Cornell as an appointed successor trustee. Michael Cornell died on December 15, 2009.

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<sup>1</sup> As set forth in greater detail herein, the Estate maintains that this is an issue of both form *and* substance. At the Court's May 17 hearing, Ms. Johnson's attorney made the statement that she only represented Ms. Johnson, and not the Trust.

John Cornell filed a Petition regarding the Trust on July 11, 2012. John died on August 20, 2012. Ms. Johnson filed a Motion to Dismiss on September 17, 2012, arguing that the claims in John's petition abated upon his death. Ms. Johnson also argued that because John died, there existed no legitimate party in interest unless and until the Estate was substituted into the action pursuant to Idaho Rule of Civil Procedure 25(a)(1). For reasons beyond Kareen Cornell's control, John's attorney continued to prosecute the petition in John's name, personally. In late November 2012, Ms. Cornell appeared before this Court and notified the Court that she objected to any other person acting on behalf of her late husband. While this Court invited Ms. Cornell to submit briefing on John's petition, it did not bring her or the Estate into the litigation. Thus, Ms. Cornell's briefing was, in effect, *amici* briefing. On February 15, 2013, this Court issued a Memorandum Opinion. In that opinion, the Court dismissed the petition filed by John Cornell. The Court expressly invited Ms. Cornell to file claims on behalf of the Estate.

Ms. Cornell responded to the Court's invitation by filing the Estate's Petition on February 28, 2013. The Estate's petition seeks supervised administration and court ordered distribution of the Trust. The Estate's Petition alleges that Ms. Johnson (1) failed to act in conformity with the terms of the Trust; (2) breached her fiduciary duties when acting in her capacity as Trustee; (3) engaged in equitable conversion of the property belonging to John by refusing to distribute the property in accordance with the dictates of the Trust document and her fiduciary duty; and (4) was unjustly enriched by (a) misusing Trust assets for personal desires, and (b) refusing to comply with the terms of the Trust and her fiduciary duties in order to effect a distribution in her favor.

The Estate deposed Ms. Johnson on April 22, 2013. At her deposition, Ms. Johnson revealed that she holds in her possession personal and real property belonging to the Trust. *See Aff. of Theodore O. Creason*, Exh. A, p. 71 l.17 – p.72 l.7. Ms. Johnson also disclosed, through testimony and records provided at deposition, that she has commingled cash assets of the Trust with her own cash assets and with cash assets, she received from Kareen and John Cornell. *See Aff. of Theodore O. Creason*, Exh. B, pp. 49-63. Ms. Johnson stated that she has spent all of the cash assets she comingled with cash belonging to the Trust for her living expenses and expenses incurred maintaining and paying taxes on the Trust property. *See Aff. of Theodore O. Creason*, Exh. B, pp. 51-63. When asked to explain by what right she expended Trust assets and comingled Trust assets and the Cornells' assets with her own, Ms. Johnson testified that she received oral permission from John Cornell to take such actions and to live in the Trust's residential property without paying rent. When Ms. Johnson was confronted about the Trust's terms prohibiting comingling of assets or retaining non-income producing property upon death of the surviving Trustor, Ms. Johnson responded that she had her brother's permission and acquiescence to proceed this way.<sup>2</sup> *See Aff. of Theodore O. Creason*, Exh. C, p. 23 ll.10–16.

On May 7, 2013, Ms. Johnson filed her motion to dismiss the Estate's Petition. In her Memorandum in Support of that motion, Ms. Johnson claims that the Estate's Petition should be dismissed, as a matter of law, by arguing that (1) this Court's February 15, 2013 Memorandum

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<sup>2</sup> Ms. Johnson's testimony creates a genuine issue of material fact regarding her compliance with the Trust document. Her testimony makes it abundantly clear that she did not believe she was bound by the provision and limitations contained in the trust document. In fact, she denies having seen the entire trust document until the time of the deposition. *Johnson Depo.* p. 73 ll 9-19. There are a host of yet unanswered questions about the manner in which Ms. Johnson managed her parents' affairs after their deaths. Ms. Johnson testified that she believes that her father had a will when he died, and that it may be at the house. She has promised to find it and deliver it to Ms. Seubert, but so far, she has not done so. *See Aff. of Theodore O. Creason*, Exh. D, pp. 74–75.

Opinion binds the Estate; (2) the facts alleged due not support a cause of action for constructive trust; (3) all breach fiduciary duty claims abate upon death; (4) the claims of breach of contract and unjust enrichment are actually breach of fiduciary duty claims, which abate; (5) the claim for conversation abates upon death; and (6) the Trust cannot hold a creditor's claim against Ms. Johnson because the Estate cannot establish a valid claim as against Ms. Johnson.

On May 17, this Court held a hearing on the Estate's motion to stay the proceedings until the district court ruled on a recently filed Trust and Estate Dispute Resolution Act petition. While the Court denied the Estate's motion, a statement was made by opposing counsel that bears significant relevance to the current motion. Opposing counsel stated that she has been representing Ms. Johnson, personally, and has never considered herself the attorney on behalf of the Trust. As set forth below, Ms. Johnson's motion to dismiss should be denied because this creates a genuine issue of material fact regarding the Trust's position and the nature of Ms. Johnson's appearance and the arguments of counsel.

### **III. ANALYSIS**

#### **A. Standard of Review**

Summary judgment is only appropriate when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c).<sup>3</sup> If reasonable persons could reach different findings or draw conflicting inferences from the evidence when all facts are liberally construed in favor of the Estate, the Court must deny Ms.

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<sup>3</sup> Contrary to the assertion made in Ms. Johnson's brief, the Estate has not stipulated to treat Ms. Johnson's motion as a motion for summary judgment. Therefore, implicit in Ms. Johnson's filing is a request that the court convert the



Johnson's motion. See *Rausch v. Pocatello Lumber Co., Inc.*, 135 Idaho 80, 83, 14 P.3d 1074, 1077 (Ct. App. 2000); *Coonse ex rel. Coonse v. Boise Sch. Dist.*, 132 Idaho 803, 805, 979 P.2d 1161, 1163 (1999). Ms. Johnson carries the burden of establishing entitlement to summary judgment.

**B. The nature of Ms. Johnson's appearance and legal representation in this matter creates genuine issue of material fact**

The Court has been presented with evidence in the form of a statement on the record that creates a reasonable inference that Ms. Johnson has been pursuing this matter solely in her personal capacity. At the May 17 hearing, Ms. Johnson's attorney expressly stated on the record that she has only ever represented Ms. Johnson in her personal capacity and did not consider herself as attorney for the Trust. The scope of her attorney's representation is an issue of historical fact that cannot later be characterized based upon singularity of interest or desire to avoid challenges to procedural missteps. This disclosure creates genuine issues of fact regarding (1) whether Ms. Johnson may pursue a motion to dismiss in her personal capacity; (2) whether the Trust has appeared and provided its position as to the issues raised in the Estate's Petition, and (3) whether the actions taken and discovery provided by Ms. Johnson have any binding effect as against the Trust. The resolution of these facts is material to disposition of this matter. Therefore, Ms. Johnson's motion should be denied.

The Estate's Petition seeks supervised administration of the Trust and Court ordered distribution. The Estate is a party to this action as a Petitioner claiming that the decedent was deprived of his property right, which vested at the time of the death of Michael Cornell, or

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motion to dismiss to one for summary judgment, which the court must first do if it considers factual allegations outside the pleadings. *Hellickson v. Jenkins*, 118 Idaho 273, 796 P.2d 150 (Ct. App. 1990).

shortly thereafter. The Estate also seeks an order of restitution to the Trust for those damages incurred by it because of Ms. Johnson's inequitable conduct.

Ms. Johnson's personal interest in this litigation is that of a beneficiary of the Trust. Ms. Johnson has not sought joinder under the Idaho Rules of Civil Procedure to be recognized as a party. The fact that Ms. Johnson has only been appearing in her personal capacity means that the Court has not been provided with an appearance by the Trust and statement of the Trust's position. Part of the basis for Ms. Johnson's request for summary judgment is her claim that John's interests in the property would not vest until distribution. While that may be the position of a beneficiary seeking a greater distribution of the Trust res, the Court should demand input from the Trustee—acting in her fiduciary capacity as trustee—before granting Ms. Johnson's request for summary judgment.

Ms. Johnson's pursuit of this motion in her personal capacity is also inconsistent with her proposed interpretation of the Trust document. Ms. Johnson claims that all interests in the Trust res remain contingent until distribution. She further claims that no distribution has been effected in law or in fact. Therefore, she remains a contingent beneficiary to this day (under her reasoning). A contingent beneficiary is not a real party in interest, such that he or she may participate in actions involving the Trust. *Carl H. Christensen Family Trust v. Christensen*, 133 Idaho 866, 870, 993 P.2d 1197, 1201 (1999). Thus, under Ms. Johnson's proposed interpretation, she lacks standing to oppose supervised administration and Court ordered distribution of the Trust.

The scope of representation of Ms. Johnson's counsel also creates genuine issues of material fact regarding the position of the Trust and the nature of disclosures made by Ms.

Johnson in this litigation. If the Trust has not appeared and has not retained counsel, then this failure is yet another grounds for instituting supervised administration and distribution of the Trust. When acting as a Trustee, Ms. Johnson holds a duty to each beneficiary to protect the Trust res, even if that protection is against her own actions. The Estate is now left to question whether the discovery produced and arguments propounded in this action are from a source acting in her capacity as Trustee or from an individual pursuing her personal interests. Because this question has been raised by Ms. Johnson at so late a date, her motion for summary judgment should be denied.

**C. The Estate is not precluded from pursuing its claims through the law of the case doctrine**

Ms. Johnson argues that the Estate should be precluded from litigating its claims based upon the Court's ruling against Margaret Watkins. Ms. Johnson cites the law of the case doctrine as the sole supporting legal authority for her argument. The law of the case doctrine does not apply to the Estate's Petition.

The rule of the case doctrine applies where a case has left the jurisdiction of one court and proceeded on to another court acting in its appellate capacity. *See Swanson v. Swanson*, 134 Idaho 512, 516, 5 P.3d 973, 977 (2000). The doctrine holds that once an appellate court has ruled on an issue, that ruling becomes the law of the case for all subsequent proceedings in the case. *Id.* It also holds that where a party fails to appeal an appealable ruling, the issue may not be reopened upon remand. *Id.*

Here, the claims of the Estate set forth in its Petition have not left the jurisdiction of this Court. The language and the nature of this Court's Memorandum Opinion against Ms. Watkins

make clear that it was not issuing judgment as against the Estate. Instead, the Court invited the Estate to file a petition raising its claims against the Trust. Further, the Court could not have issued a judgment as against the Estate at that time, because the Estate was not a party to this litigation until it filed its Petition. Ms. Johnson continues to maintain that the Estate and Ms. Watkins are somehow the same party; they quite simply are not. The existence of a party is established by appearance and procedure, not by similarity of interests. While the Estate shares Ms. Johnson's dismay regarding the continued pursuit of "John Cornell's claims" by a person having no rightful authority to pursue those claims, the Estate cannot be bound by rulings against that person. The law of the case doctrine does not apply to the Estate's Petition.

**D. A genuine issue of material fact exists regarding whether the Trust held property of John Cornell in a constructive trust at the time of his death**

Ms. Johnson argues that the doctrine of constructive trust is inapplicable because the Trust, not Ms. Johnson, holds legal title to disputed property. Ms. Johnson's argument misunderstands the nature of the Estate's Petition. The Petition does not allege that Ms. Johnson holds title the disputed property, but rather that Ms. Johnson engaged in inequitable conduct by retaining legal title in the name of the Trust. The doctrine of constructive trust holds that property may *actually belong to another* in a quasi-trust relationship in certain circumstances. The Estate's Petition alleges that the property due John under the Trust actually belonged to him in constructive trust at the time of his death.

"When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee." TRUST, Black's Law Dictionary (9th ed. 2009), trust (internal quotation marks and citation

omitted); *see also Hanger v. Hess*, 49 Idaho 325, 328, 288 P. 160, 161 (1930). The doctrine of constructive trust is a description of the nature by which a wrongdoer holds the property of another; the court deems that property as already belonging to the injured party at some earlier point in time. This doctrine rests upon “the fundamental rule of equity that equity regards that as done which ought to be done.” *See First Sec. Bank of Idaho, Nat. Ass’n v. Rogers*, 91 Idaho 654, 657, 429 P.2d 386, 389 (1967) (discussing basis of doctrine of equitable conversion).

In this case, Ms. Johnson ought to have distributed the Trust res as soon as reasonably practicable when the Trust automatically terminated upon the death of Michael Cornell. *See* Trust 4.03. The undisputed extended period of time between the death of Michael Cornell and the death of John Cornell, taken by itself, creates a genuine issue of material fact regarding whether a constructive trust arose. In its February 15 Memorandum, this Court found that Ms. Johnson “lived rent free in the home that is included in the trust and apparently paid all her living expenses from trust funds.” At her deposition, Ms. Johnson testified that she comingled cash assets of the Trust with her own cash. Her records produced at deposition show that she comingled cash she received from John and Kareen with Trust cash assets. She testified that she has spent all the Trust’s cash assets including the comingled funds on upkeep and taxes and on personal expenses. She has testified that she is making arrangements to borrow money from a relative to provide cash to live on. *See Aff. of Theodore O. Creason*, Exh. E, p. 92 ll. 15–25. In short, it appears that Ms. Johnson within a very short time after her father’s death was treating Trust property as though it was her own. (*See Aff. of Theodore O. Creason*, Exh. B). Because John Cornell was entitled to distribution long before his death, and because Ms. Johnson deprived him of his property through inequitable conduct, the fundamental rule of equity governs

in this case: the Court should treat the Trust property as properly distributed to John long before his death. Therefore, the manner in which Ms. Johnson has retained that property is not through the terms of the Trust but through the doctrine of constructive trust.

While evidence of Ms. Johnson's malfeasance supports a claim for breach of fiduciary duty, it also supports a claim in equity that the property due to John was being held in constructive trust. By establishing that property being held in the name of the Trust was being held in constructive trust for John, the Estate can establish a property interest that existed at the time of death. A constructive trust has no terms other than that the property is due to the proper party. A claim for return of property survives the death of the decedent and passes to his personal representative. *See* 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 56. *See Henshaw v. Miller*, 58 U.S. 212 (1854) (cause for taking of chattels survives). Therefore, the Estate's claim of constructive trust should not be dismissed.

**E. The breach of contract claim is distinct from a breach of fiduciary duty claim**

Ms. Johnson argues that the Estate's breach of contract claim should be interpreted as a breach of fiduciary claim and deemed abated consistent with the reasoning of the Court in its February 15 Memorandum. A breach of contract claim is distinct from a breach of fiduciary duty claim. A breach of contract claim focuses on the trustee's failure to adhere to the terms of the trust document; a breach of fiduciary duty claim focuses on the trustee's failure to act in accordance with the standard of conduct required of the trustee under statutory and common law.

"A trust is not itself a separate legal entity that can own property; rather, it is a relationship having certain attributes." *In re Thompson*, 454 B.R. 486, 492 (Bankr. D. Idaho 2011). "A trust creates a fiduciary relationship in which the trustee is the holder of legal title to

the property subject to the beneficial interest of the beneficiary.” *DBSI/TRI V v. Bender*, 130 Idaho 796, 808, 948 P.2d 151, 163 (1997). The scope and nature of that relationship is defined by the terms of the trust, i.e. the contract. A trustee’s fiduciary duties and contractual duties are intertwined, yet distinguishable. The Restatement (Third) of Trusts § 2 defines a trust as

... a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of . . . one or more persons, at least one of whom is not the sole trustee.

The relationship between beneficiary and trustee is contractual in nature, having a standard of contractual dealing on the part of the trustee as that of a fiduciary. To argue that no contractual claim may lie against the trustee is to argue that the terms of the trust document have no substance.

The contractual relationship established by the Trust document contains the following terms:

- 4.03 & 4.04: The Trust terminates automatically upon the death of the surviving Trustor and the successor Trustee is to distribute the property “as soon as reasonably possible.”
- 5.01: The only property which may be retained in the Trust after the death of the surviving Trustor is property productive of income.
- 8.02: The successor Trustee shall render an accounting from time to time.

The Estate alleges that Ms. Johnson breached these contractual provisions through her conduct. At deposition, Ms. Johnson conceded that she had not seen the trust instrument before the deposition. Rather, her position seems to be that despite her dispute with her brother, she had an oral agreement with him that she would live in the house rent free while she tried to sell it; that she would use the Trusts’ cash for her living expenses; and that she would divide the proceeds with John when the house and real property sold. If that is the version of the facts the Court



accepts, then Ms. Johnson has not been following the terms of the Trust, rather the terms of the oral contract with John. In that scenario, the Trust res devolved to John Cornell and Ms. Johnson by intestate succession (or Will if one is found) upon the death of Michael Cornell, subject to administration. I.C. §15-3-101. There are, of course, legal and evidentiary hurdles Ms. Johnson will have to overcome to succeed on this theory, but the point is she was bound to act in a contractual relationship with John with the terms of that contract either being the Trust or the oral agreement.

**F. The Estate's claims for breach of fiduciary duty did not abate upon John's death**

The common law governs the issue of survivability of an action upon death of the injured party in all actions where the injured party's cause of action arose prior to July 1, 2010. *See Bishop v. Owens*, 152 Idaho 616, 619 (2012). Johnson's argument on survival under the common law relies upon the analysis in *Bishop*. The *Bishop* Court set forth the general rule regarding survival of claims at common law: "Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate." *Id.* This case, however, does not fall under that general rule. The cause of action before the *Bishop* Court sounded in "pure tort" as it was for attorney malpractice and the contract between the attorney and his client provided no terms additional to those required of an attorney through his or her rules of professional responsibility. The cause of action did not involve a claim to property held in trust by another.

While the *Bishop* Court identified the general rule, the common law is more nuanced in cases involving property. In such cases, the survival of an action depends upon the nature of the interest affected.

At common law survivable actions are those in which the wrong complained of affects primarily property and property rights, and in which any injury to the person is incidental, while nonsurvivable actions are those in which the injury complained of is to the person and any effect on property or property rights is incidental. . . .

. . . The general rule is that, in addition to the causes of action arising out of contract recognized at common law, causes of action arising from torts to real and personal property survive and pass to the personal representative of the decedent, while purely personal torts do not survive in the absence of statutory provision.

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 51. Thus, in cases where the injured party alleged an injury to his property—such as the existence or amount of his interest in a trust—the claim survives. See *Henshaw v. Miller*, 58 U.S. 212 (1854) (cause for taking of chattels survives). See also, *Barnes v. Barnes*, 135 Idaho 103, 105, 15 P.3d 816, 818 (2000) (holding that issues regarding property survive).

The survivability of this action is further supported by the fact that it arises pursuant to a remedial statute and that it is equitable in nature. The petition seeks recovery based upon a trustee's breach. A cause of action which is founded under Idaho Code §§ 15-7-101 through 15-7-601. "A cause of action that is founded on a remedial statute . . . survives the death of the party possessing the cause of action." 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 59. Further, the causes of action pled here are equitable in nature.

The principle that a cause of action expires with the death or disability of a party generally does not apply to suits in equity; equitable remedies exist to the same extent in favor of and against executors and administrators as they do against the decedent, as long as the court can continue to grant effective relief in spite of the death. One of the main reasons for this stance for suits in equity is that such suits primarily pertain to property rights.

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 60 (footnotes omitted). Thus, under the common law, the causes of action pled in this case survive John's death.

Idaho Code § 5-327(2) governs the issue of survivability of an action upon death of the injured party in all actions where the injured party's cause of action arose after July 1, 2010. While the causes of action in this case survive John's death under the common law (as set forth above), the Idaho legislature made survival explicit in its enactment of section 5-327(2):

A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence. Such action shall be commenced or, if already commenced at the time of the death of the injured person, shall be thereafter prosecuted by the personal representative of the estate of the deceased person or, if there be no personal representative appointed, then by those persons who would be entitled to succeed to the property of the deceased person according to the provisions of section 5-311(2)(a), Idaho Code.

The facts pled in the Estate's Petition give rise to an action for the damage caused by Ms. Johnson's improper conduct. The alleged damage is diminution of the Trust res; a diminution in the value of the property interest John held in the Trust res.

Both the common law and Idaho Code § 5-327 support a ruling that the causes of action set forth in the Estate's Petition survive the death of John. If the deceased held a property interest at the time of death, that interest falls into the estate, where it is later distributed to the beneficiaries. The alleged wrongdoer does not get to convert the deceased's property to her own simply because the deceased did not survive to the point of judgment. The Estate asks this Court to reject Johnson's proposed interpretations would result in an unjust and inequitable conclusion.

**F. The Estate's claims of conversion did not abate upon John's death**

Ms. Johnson's argues that the Estate's claim of conversion abated upon John's death. In essence, she argues that a wrongdoer may retain the property of a decedent so long as the decedent is not able to recover the property prior to death.

First, John held a vested property interest in the Trust res at the time of his death. The terms of the Trust are that "[o]n the death of the surviving Trustor, *the Trust shall terminate* and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them . . . ." Trust, 4.03 (emphasis added); *see also* 4.04. The Trust terminated automatically upon the death of Michael Cornell. Thus, the only action appropriate by Ms. Johnson was to transfer the property that *now belonged to John* from the Trust to John. Instead of delivering John's property to him, she withheld it. The Estate seeks a turnover of John's property on John's behalf.

Second, John held an interest in that part of the Trust res which was placed in the Trust by him in the form of Lot 34. This is property that John transferred to the Trust for convenience because it was contiguous to his parents' home. Ms. Johnson's records show that John and Kareen continued to send cash for some period of time after Michael's death to cover the property taxes and other expenses associated with that lot. *See Aff. of Theodore O. Creason*, Exh. B.

A claim for return of property survives the death of the decedent and passes to his personal representative. *See* 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 56. *See Henshaw v. Miller*, 58 U.S. 212 (1854) (cause for taking of chattels survives). Therefore, the Estate's claim of conversion should not be dismissed.

**G. The Estate's claims of unjust enrichment did not abate upon John's death**

Ms. Johnson seeks dismissal of the Estate's unjust enrichment claim based upon the arguments set forth by her regarding breach of contract and her attempted characterization of the unjust enrichment claim as a breach of fiduciary duty claim. First, while a cause of action for unjust enrichment has similar facts to a breach of contract cause of action, they are two distinct theories for relief. Breach of contract sounds in law. Unjust enrichment sounds in equity. "Unjust enrichment occurs where [offending party] receives a benefit which would be inequitable to retain without compensating the [injured party] to the extent that retention is unjust." *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 557, 165 P.3d 261, 271 (2007). The damages available to the claimant on an unjust enrichment claim is the value of the amount by which the offending party was unjustly enriched. *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004). Like constructive trust, unjust enrichment is an equitable doctrine that seeks to return to the injured party those amounts which were due to him or her in equity; amounts which equity deems property of the injured party. If the Estate prevails on its unjust enrichment claim, it will have established that John held an equitable interest in property prior to his death. The Estate holds the right and statutory duty to recover that property of the decedent and distribute it in probate. *See* Idaho Code § 15-3-709. The claim for unjust enrichment should not be dismissed.

**IV. CONCLUSION**

The Estate has raised several claims in law and equity seeking recovery of that property in which John Cornell held an interest at the time of his death; property which Ms. Johnson

withheld from him through her improper conduct. Ms. Johnson's motion to dismiss should be denied.

DATED this 21st day of May, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Theodore O. Creason, ISB #1563

Attorneys for Surviving Spouse, Kareen Cornell

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21st day of May, 2013, I filed the foregoing MEMORANDUM IN OPPOSITION RE: MOTION TO DISMISS with the Clerk of the Court, and provided a paper copy to the following persons:

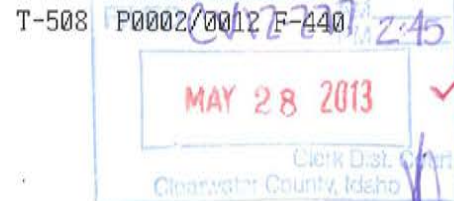
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IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

Case No. CV 2012-00277

**RESPONDENT'S REPLY BRIEF  
 RE: MOTION TO DISMISS**

COMES NOW Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., hereby submits this Reply Brief in support of the pending *Motion to Dismiss*, which is set for hearing on June 4, 2013.

This Reply Brief does not restate the procedural and factual background of the case and applicable law previously submitted. Instead, it is limited in scope to the points raised by the *Memorandum in Opposition re: Motion to Dismiss* dated May 21, 2013.

**I. ARGUMENT**

**A. No issues of material fact related to Ms. Johnson's appearance and counsel preclude dismissal.**

The Estate raises a variety of questions relating to whether Respondent's involvement in this case has been in her personal capacity or capacity as trustee. To be clear, Respondent has participated in this action in her personal capacity and as trustee. The undersigned attorney represents Respondent in both capacities, just as counsel for Mrs. Cornell represents Mrs. Cornell in her capacity as surviving spouse and her capacity as personal representative of her deceased

RESPONSE BRIEF



husband's estate (see *Petition by Kareen Cornell as Personal Representative of the Estate of John Henry Cornell and as Surviving Spouse of John Henry Cornell, deceased beneficiary of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell for Supervised Administration and Court Ordered Distribution* dated February 26, 2013 (emphasis added)). Any inaccurate or hastily made comment by this attorney at the hearing of May 17, 2013 on Mrs. Cornell's *Motion to Stay Proceedings* was in error and is hereby retracted with apologies for any unintended confusion that may have been caused.

This dual capacity is appropriate and consistent with Respondent's positions throughout this action because the express terms of the trust provide that, upon Mr. Cornell's death with no surviving issue, Respondent becomes the sole surviving beneficiary. See Trust at § 4.03(a). The Grantors intent in this regard is unequivocal and clear: that the Trust assets be distributed to lineal descendants of the Grantors. Respondent, as trustee, is obligated to uphold the terms of the Trust and to defend the Trust against attempts to break its terms. This obligation continues despite any mistakes that may have been made by the Trustee.

To that end, Respondent's personal interests and interests as Trustee are identical and the concerns raised by Mrs. Cornell do not raise genuine and material questions of fact.

**B. The Court's Memorandum Opinion is binding upon the Estate.**

Mrs. Cornell characterizes this Court's *Memorandum Opinion* as being against Margaret Watkins and contends that the Estate was not a party to the case until Mrs. Cornell filed her Petition in February 2013. Respondent respectfully disagrees.

The *Petition* at issue in this Court's *Memorandum Opinion* of February 2013 was filed by John H. Cornell during his lifetime. Only the Estate is the successor in interest to John H. Cornell. The acts of Margaret Watkins, while acting as the Estate's temporary personal representative, are binding upon the Estate and current personal representative Mrs. Cornell.

Mrs. Cornell's states "For reasons beyond Kareen Cornell's control, John's attorney continued to prosecute the petition in John's name, personally. In late November 2012, Ms. Cornell appeared before this Court and notified the Court that she objected to any other person acting on behalf of her late husband. While this Court invited Ms. Cornell to submit briefing on John's petition, it did not bring her or the Estate into the litigation." *Memorandum in Opposition re: Motion to Dismiss* at 3.

If Mrs. Cornell believed that Margaret Watkins was not properly representing the interests of the Estate during the time that Ms. Watkins served as temporary personal representative, then it was not "beyond Kareen Cornell's control" to file a motion seeking the removal of Ms. Watkins as temporary personal representative for cause, which would have severely limited Ms. Watkins' functions. See I.C. § 15-3-611(a). No such action was taken and no good cause has been shown to permit the Estate to re-litigate the issues previously decided.

That being said, this Court's *Memorandum Opinion* remains well-based in fact and law such that it is largely an academic exercise to debate whether dismissal is warranted due to the binding nature of the *Memorandum Opinion* or whether dismissal is warranted because the law remains the same, as discussed herein. No genuine fact has been shown to change the application of law to the essentially identical facts alleged. Dismissal remains appropriate.

**C. The causes of action in this proceeding do not survive Mr. John Cornell's death.**

The balance of the claims raised by Mrs. Cornell are either identical to or variations upon the issues previously addressed by the Court: that the Estate's claims for constructive trust (see pp. 8-11), breach of contract (see pp. 11-13), breach of fiduciary duty (see pp. 13-15), conversion (see p. 16), and unjust enrichment (see p. 17) are not abated by the death of John H. Cornell. Each is discussed below.

**1. The Estate's constructive trust claim is an abated claim for breach of fiduciary duty.**

As for the Estate's claim under the doctrine of constructive trust, the Estate criticizes Respondent's analysis that because Toni Johnson did not hold title to the Trust assets, then a claim for constructive trust does not arise.

First, this argument is flawed because a review of Idaho case law finds that application of the doctrine of constructive trust has been limited to the improper acquisition of property, not the retention of property as the Estate suggests. See *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986) (citing *Davenport v. Burke*, 30 Idaho 559, 167 P. 481 (1917)); *Snider v. Arnold*, 153 Idaho 641, 289 P.3d 43 (2012) (citing *Davenport*, 30 Idaho at 608, 167 P. at 483).

Further, the Estate fails to distinguish Respondent's actions from a breach of her fiduciary duty, which is a tort abated by John's death. See *infra* ¶ I(C)(3). The Estate has presented no facts or argument to support a distinct analysis except for the argument that constructive trust arises in equity, not in law.

The Estate asserts that “[t]he undisputed extended period of time between the death of Michael Cornell and the death of John Cornell, taken by itself, creates a genuine issue of material fact regarding whether a constructive trust arose.” *Memorandum in Opposition re: Motion to Dismiss* at 10. Said determination is a question of law, not one of fact as there is no dispute that Michael Cornell died on December 15, 2009 and John Cornell on August 20, 2012. Respondent’s actions as Trustee during this time period are also not in dispute as Respondent does not dispute that she failed to distribute Trust assets during this time period, that she was ill-advised as to her responsibilities, and made mistakes accordingly in terms of administration of Estate funds and lack of accounting. See *Aff. of Theodore O. Creason* generally. There are simply no material facts of genuine dispute that preclude dismissal as a matter of law and the Estate has failed to support how its interpretation of the doctrine of constructive trust is in conformance with existing Idaho law or supported by the facts of this case.

Instead, the Estate asserts that its claim for constructive trust is a claim for return of property, which survives the death of the decedent and passes to the decedent’s personal representative. In support of this position it cites to a non-binding treatise and the U.S. Supreme Court case of *Henshaw v. Miller*, 58 U.S. 212 (1854). The Estate’s reliance is misplaced, however, because the *Henshaw* case interpreted the then Virginia statute which provided that “Executors shall have an action of trespass for a wrong done to the testator,” which the Court interpreted to amend the common law to allow claims for trespass and taking of chattel. *Id.* at 221-22. Said decision does not stand for the broader application of the doctrine of constructive trust that the Estate suggests. Instead, the common law and Idaho Code Section 5-327 apply.

For these reasons and the reasons previously briefed, the Estate’s claim for constructive trust should be dismissed.

2. The Estate’s breach of contract claim is an abated claim for breach of fiduciary duty.

The Court’s prior conclusion and reasoning remains accurate: “the duties John asserts Toni breaches arise irrespective of contract. The duties are grounded in state law regardless of what the contract states. ... The alleged wrongful acts of Toni are all breaches of fiduciary duties under state law that for purposes of abatement are in the nature of torts. ... John makes no claim against Toni and the administration of the estate of their parents that survives his death under the

common law or under Idaho Code § 5-327." *Memorandum Opinion* at 9, 10, 17. See also *infra* ¶ I(C)(3).

Whether Respondent had fully reviewed or understood the Trust document is irrelevant. Whether Respondent acted in practical terms based on an oral conversation with her brother is irrelevant. Respondent does not contend that ignorance of the Trust's provisions relieve her from responsibility or that the beneficiaries had the authority to modify the Trust's terms. It is the Estate that raises that theory, although provides no legal authority to support the proposition that the beneficiaries to a trust may amend its terms through contract or factual basis as to what said alleged contract's terms were or consideration given that makes this alleged contract now enforceable against Respondent. For these reasons, the Estate's allegations in this regard do not preclude dismissal.

Instead, the Trust document is not a contract, thus no breach of contract claim can arise from it. The existence of a written document (the Trust Agreement) does not establish a contractual relationship between Respondent and the Estate (or its predecessors), nor does it establish a potential claim by the Estate against Respondent grounded in contract. Instead, said relationship is fiduciary in nature.

For these reasons and the reasons previously briefed and incorporated by reference herein, the Estate's claim for breach of contract must be dismissed.

3. The Estate's claim for breach of fiduciary duty is abated.

Respondent disagrees with the Estate's analysis that torts involving property do not abate.

A claim for breach of fiduciary duty sounds in tort. See *Jones v. Kootenai County Title Ins. Co.*, 125 Idaho 607, 612, 873 P.2d 861, 866 (Idaho 1994) ("A contract may... create a state of things which furnishes the occasion for a tort. If the relation of the plaintiff and the defendants is such that a duty to take due care arises therefrom irrespective of contract and the defendant is negligent, then the action is one of tort.")

The Idaho Supreme Court recently discussed Idaho abatement law as follows:

The abatement rule holds that in the absence of a legislative enactment addressing the survivability of a claim, the common law rules govern. Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate.

... The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained. Breach of an attorney's duty is negligence in tort. The contract basis of legal malpractice actions is the failure to perform obligations specified in the written contract. Thus, under the abatement rule, breach of duty is an action in tort, not contract; that is, unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney. Breach of that duty is a tort.

... [T]he contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct. If an attorney and client want to provide for a higher standard of care, they may do so by express language in the contract. Here, the standard of care in the contract is essentially the same as in any attorney-client relationship. Because this claim sounds in tort, it abated upon [the client's] death.

*Bishop v. Owens*, 152 Idaho 616, 620-21, 272 P.3d 1247, 1251-52 (2012) (citations omitted).

Similar to the attorney-client relationship at issue in *Bishop*, the contours of the duties owed by a trustee to trust beneficiaries are defined by the Uniform Probate Code and Principal and Income Act. Here, the Trust contains no greater requirements than are set forth in said statutes. Therefore, the analysis of Idaho Code Section 5-327(2), and the common law rule of abatement prior to its amendment, applies.

Because a breach of fiduciary duty arises in tort, it abates upon the injured person's death under the common law. As such, the Estate's breach of fiduciary duty claim is abated unless a statute precludes dismissal.

The statutory section that governs the survivability of negligence claims is Idaho Code Section 5-327(2), which was amended in 2010 with the amendment taking effect on July 1, 2010.

First, in its form prior to July 1, 2010, Idaho Code Section 5-327 provided that claims for personal injury or property damage survived only the death of the wrongdoer. The later was not retroactive, thus applied until July 1, 2010. See *Bishop*, 152 Idaho at 620, 272 P.3d at 1251. Applying the facts in the light most favorable to the non-moving party, the Estate as successor in interest to John H. Cornell is the injured party. As such, the Estate's claims that may have arisen prior to July 1, 2010 were extinguished by John Cornell's death and must be dismissed.

Second, Idaho Code 5-327(2) as amended and in effect on and after July 1, 2010 provides that claims for personal injury or property damage survive the death of the injured person, but that recoverable damages are expressly limited to medical expenses, other out-of-pocket

expenses, and lost earnings prior to death.

The tort of breach of fiduciary duty is neither an "action for personal injury" nor an action for "property damage" as it does not involve tangible property that was allegedly damaged as is the common and ordinary meaning of the phrase "property damage." As such, this action falls outside of the amended Idaho Code Section 5-327(2), the general common law rule applies, and any claim for breach of fiduciary duty was extinguished by John Cornell's death.

Further, even if the Court concludes that the Estate's claim is one for "property damage," no genuine issue of material fact exists that the Estate does not seek damages recoverable under the statute. The Estate clearly admits that it seeks "(1) the return of real property placed by John Cornell in the Trust for safekeeping; and (2) the turnover of property which vested in John Cornell years before his death but was wrongful withheld from him." *Memorandum in Opposition re: Motion to Dismiss* at 1. Said relief does not include medical expenses, out-of-pocket expenses or lost wages. As such, the Estate's claim is outside of the scope of Idaho Code Section 5-327(2), is abated by John H. Cornell's death, and must be dismissed.

4. The Estate's conversion claim is abated.

In its opposition brief, the Estate does not dispute that conversion is an intentional tort. See *Brooks v. Gigray Ranches, Inc.*, 128 Idaho 72, 77,910 P.2d 744, 749 (1996). As such, the same analysis as the Estate's claim of breach of fiduciary duty applies, the conversion claim is abated and must be dismissed.

The Estate discusses two points in the conversion section of its opposition brief: that John Cornell held a vested property interest in the Trust res at his death, and that John held an interest in the real property that he had conveyed to the Trust. *Memorandum in Opposition re: Memorandum to Dismiss* at 16. Although it does not articulate it as such, Respondent concludes that the Estate in this regard actually refers to the doctrine of equitable conversion, not only the intentional tort of conversion.

A review of Idaho case law finds no cases discussing the doctrine of equitable conversion outside of the context of disputed real estate transactions, and none in the trust context as the Estate proposes. The Idaho Supreme Court has discussed said doctrine as follows:

The doctrine of equitable conversion is a fiction resting upon the fundamental rule of equity that equity regards that as done which out to be done. Under the doctrine, an equitable conversion takes place when a contract for the sale of real

property becomes binding on the parties. The purchaser is then treated in equity as having an interest in realty, and the vendor an interest in personalty, that is, the right to receive the purchase money. Thus, when equitable conversion applies, the contract purchaser is deemed the equitable owner of the realty, and assumes the risk of loss on the property. ... The doctrine of equitable conversion applies only if nothing in the contract states otherwise. Thus, equitable conversion does not apply if the effect would be to shift the risk of loss to a buyer contrary to the terms of the parties' agreement.

*Holscher v. James*, 124 Idaho 443, 446, 860 P.2d 646, 649 (1993) (citations omitted).

First, the Estate does not explain how its position that the decedent held a vested interest in the Trust at the time of his death supports a claim for equitable conversion. It provides no Idaho authority to support its position that a claim for return of property survives the death of the decedent and passes to the decedent's personal representative, but instead cites to a non-binding treatise and the U.S. Supreme Court case of *Henshaw v. Miller*, 58 U.S. 212 (1854), which, as discussed *supra*, concerned a Virginia statute interpreted as having amended the common law to allow claims for trespass and taking of chattel. *Id.* at 221-22. Said decision does not stand for a broadened application of equitable conversion.

Further, the Estate's position in this regard contradicts the express language of the Trust: that all net income and principal remaining in the Trust vest in the surviving beneficiary should one beneficiary die prior to distribution leaving no issue. Trust at § 4.03(a) (attached to *Petition*). If the decedent beneficiary's interest vested upon the Grantors' death, then the Trust language making survival until distribution a requirement would have no effect. It is the intention of the grantor which must be given effect when a reviewing court interprets a trust. *Hedrick v. West One Bank, Idaho, N.A.*, 123 Idaho 803, 805, 853 P.2d 548, 551 (1993) (interpreting a will). Here, the grantors' intent was clear: that the Trust be distributed to the lineal descendants of Michael and Arlie Cornell. Trust at § 4.03(a) (attached to *Petition*). This clear and unambiguous intent cannot be reconciled with the position that John Cornell held a vested interest in the Trust res upon the Grantors' deaths. For these reasons, the Estate's claim of equitable conversion related to the Trust generally must be dismissed.

Second, the Estate does not explain how its position that John Cornell's conveyance of real property supports a claim for equitable conversion. John Cornell conveyed said disputed property by quitclaim deed on January 3, 2007 retaining no interest of any kind. *See Aff. of*

*Theodore O. Creason* at Exh. 5 to Exh. B. The Estate provides no deposition testimony, sworn statements or admissions to support the factual conclusion that said property had been “transferred to the Trust for convenience because it was contiguous to his parents’ home.” *Memorandum in Opposition re: Motion to Dismiss* at 16. The Estate further asserts, without supporting affidavit, deposition testimony or admissions, that funds sent voluntarily by the decedent were to cover property taxes and expenses related to said lot. See *Memorandum in Opposition re: Motion to Dismiss* at 16 (citing *Aff. of Theodore O. Creason*, Exh. B).<sup>1</sup>

Although the Estate is entitled to all reasonable inferences, it cannot rest upon the mere allegations, but instead must set forth specific facts supported by the pleadings, deposition testimony, affidavits or admissions on file showing that there is a genuine issue for trial. *Shere v. Pocatello School Dist. No. 25*, 143 Idaho 486, 489-90, 148 P.3d 1232, 1235-36 (2006); *Summer v. Cambridge Joint School Dist. No.*, 432, 139 Idaho 953, 955, 88 P.3d 772, 774 (2004). Here, no such showing has been made to support its claim that the Estate holds a vested property interest in the real property that he conveyed to the Trust by Quitclaim Deed in 2007, or that funds were sent specifically to cover property taxes and related expenses. For these reasons, the Estate’s claim of equitable conversion related to the real property previously conveyed by John Cornell should be dismissed.

5. The Estate’s unjust enrichment claim is an abated breach of fiduciary duty claim.

The Estate contends that “[u]njust enrichment occurs where offending party receives a benefit which would be inequitable to retain without compensating the injured party to the extent that retention is unjust.” *Memorandum in Opposition re: Motion to Dismiss* at 17 (citation omitted).

The Idaho Supreme Court has discussed the equitable doctrine of unjust enrichment as follows:

The two theories, quantum meruit and unjust enrichment, are simply different

<sup>1</sup> The underlined portion of the deposition testimony at p. 57 states:

Q. Where did these monies come from?

A. Okay. The 73.70 I’m not sure. 14000 I’m not sure. My dad did have a death benefit fund that was supposed to have been paid to me. My brother said, no problem. It was sent to him. His wife kept 500 of it, and I got the other part. I don’t remember how much that was. So, that’s the best I can tell you on that.

Q. Why did you believe the death benefit was supposed to go to you?

A. Because my dad said so, and, of course, when he was ill he had problems doing certain things, and he said I made a mistake. I said, oh, don’t worry about it, dad, because it didn’t matter to me one way or the other. But my brother agreed to send me part of the money back.



measures of recovery as equitable remedies. The doctrine of quantum meruit permits recovery, on the basis of an implied promise to pay, of the reasonable value of the services rendered or the materials provided. Unjust enrichment, as a fictional promise or obligation implied by law, allows recovery where the defendant has received a benefit from the plaintiff that would be inequitable for the defendant to retain without compensating the plaintiff for the value of the benefit.

Neither of these two theories allows recovery by a subcontractor who lacks a contractual relationship directly with a property owner. ... In the present case, the plaintiff subcontractors, who did not have express contracts directly with NWP, were limited to recovery upon their claims under the mechanic's lien statute. Absent that right of recovery, they have no cause of action directly against NWP for alleged unjust enrichment.

*Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 132 Idaho 754, 767-68, 979 P.2d 627, 640-41 (1999) (citations omitted).

Here, John Cornell, during his lifetime, had a potential cause of action directly against Respondent in her capacity as Trustee for breach of fiduciary duty that was extinguished by his death. See *supra* ¶I(C)(3). The relationship between trustee and beneficiary is fiduciary in nature, not contractual. See *supra* ¶I(C)(1). As such, no claim for unjust enrichment can arise from it.

For these reasons, the Estate's claim for unjust enrichment must be dismissed.

## II. CONCLUSION

Based on the foregoing, Respondent Toni Johnson respectfully requests that her Motion to Dismiss be granted and that the subject *Petition* be dismissed with prejudice.

DATED this 28th day of May, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert

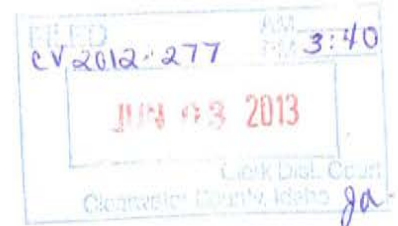
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *RESPONDENT'S REPLY BRIEF RE: MOTION TO DISMISS* was, this 28th day of May, 2013, transmitted via facsimile to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert



Theodore O. Creason, ISB #1563  
 Samuel T. Creason ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Personal Representative  
 Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

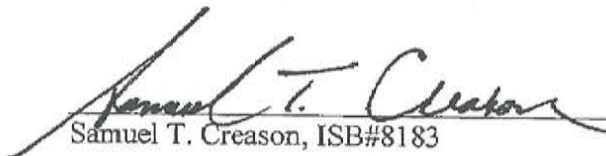
THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

Case No. CV 2012-00277

**THE ESTATE OF JOHN CORNELL'S  
 MOTION TO DISQUALIFY THE LAW  
 FIRM OF JONES, BROWER &  
 CALLERY, PLLC**

COMES NOW the Estate of John Cornell and moves this Court for an order disqualifying the Trust's attorneys, Karin R. Seubert and the law firm of Jones, Brower & Callery, PLLC, from further representation of the Trust in this case due to a conflict in interest. This motion is based upon I.R.P.C. 1.7(a) and the memorandum in support of this motion.

DATED this 3d day of June, 2013.

  
 Samuel T. Creason, ISB#8183

THE ESTATE OF JOHN CORNELL'S MOTION  
 TO DISQUALIFY THE LAW FIRM OF JONES,  
 BROWER & CALLERY, PLLC - 1

Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston, ID 83501  
 (208) 743-1516; Fax: (208) 746-2231

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 31 day of June, 2013, I filed the foregoing **MOTION TO DISQUALIFY THE LAW FIRM OF JONES, BROWER & CALLERY, PLLC** with the Clerk of the Court, and provided a copy to the following persons:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501

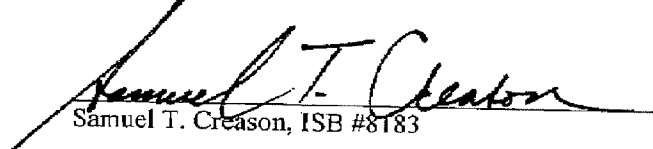
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Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

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Samuel T. Creason, ISB #8183



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 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Personal Representative  
 Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

) Case No. CV 2012-00277  
 )  
 ) **MEMORANDUM IN SUPPORT OF THE**  
 ) **ESTATE OF JOHN CORNELL'S**  
 ) **MOTION TO DISQUALIFY THE LAW**  
 ) **FIRM OF JONES, BROWER &**  
 ) **CALLERY, PLLC**  
 )

COMES NOW the Estate of John Cornell ("the Estate") and submits it Memorandum in Support of Motion to Disqualify the law firm of Jones, Brower & Callery, PLLC ("J, B & C") as attorneys for The Revocable Family Trust Of Michael S. Cornell And Arlie M. Cornell ("the Trust").

**I. FACTS & PROCEDURE**

The genesis of this petition is the alleged improper conduct of Ms. Toni Johnson, while serving as trustee of the Trust, which has damaged the Trust res and has deprived the Estate of its property interests. This Court has been supervising the administration of the Trust, through this cause number, since the filing of a previous petition by John Henry Cornell on July 11, 2012. On May 17, 2013, Ms. Seubert stated for the record "just to be clear" that J, B & C has

**MEMORANDUM IN SUPPORT OF THE ESTATE OF  
 JOHN CORNELL'S MOTION TO DISQUALIFY THE  
 LAW FIRM OF JONES, BROWER & CALLERY, PLLC - 1**

Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston, ID 83501  
 (208) 743-1516; Fax: (208) 746-2231

only ever acted as attorneys on behalf of Ms. Johnson, personally; not as the Trust's attorneys. A review of the language in the pleadings filed in this matter supports that claim.

Throughout this litigation, Ms. Johnson has taken the position that all claims that she damaged the Trust res, and thereby the beneficiaries, should be dismissed because (1) the entirety of the trust res should be distributed to her, and (2) any claims for damages abated upon the death of the only other beneficiary, John Cornell. In response to Ms. Seubert's clarifying remark, the Estate argued—in its memorandum in opposition to her motion to dismiss—that if J, B & C represented Ms. Johnson and not the Trust, then the motion to dismiss should be denied and inquiry into the Trust's position should commence. Two days before the hearing on its Motion to Dismiss, J, B & C wrote in its reply brief that it has actually represented both Ms. Johnson and the Trust the entire time.

## II. ANALYSIS

An irreconcilable conflict of interest exists between the interests of the Trust and those of Ms. Johnson, which preclude J, B & C from representing both clients under I.R.P.C. 1.7(a). In order to represent both parties, the Court must find that the Trust's interests allow for an interpretation that eliminates the Trust's power to protect itself, and rewards Ms. Johnson for improper conduct by distributing the entirety of the Trust res to her. This is an interpretation that conflicts with the plain language of the Trust document, the clear intent of the trustors, and the principles of equity. Recognizing this conflict provides context for Ms. Seubert's volunteered clarification during the May 17 hearing, and evidences J, B & C's inability to represent both parties.

### A. Standard of Review

The decision to grant or deny a motion to disqualify counsel is within the discretion of the trial court. *Weaver v. Millard*, 120 Idaho 692, 892 P.2d 110 (Ct.App. 1991); *Crown v. Hawkins Co., Ltd.*, 128 Idaho 114, 910 P.2d 786 (Ct.App. 1996). The moving party has the burden of establishing grounds for disqualification. The goal of the court should be to shape a remedy which will assure fairness to the parties and the integrity of the judicial process. Whenever possible, courts should endeavor to reach a solution that is least burdensome to the client. *Weaver*, 120 Idaho at 697. When a motion to disqualify is filed by an opposing party, it should be viewed with caution. *Foster v. Traul*, 145 Idaho 24, 32, 175 P.3d 186, 194 (2007).

**B. A Conflict of Interest Exists Under Idaho Rule of Professional Conduct Rule 1.7.**

As a general rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. I.R.P.C. 1.7. Idaho Rule of Professional Conduct 1.7 provides as follows:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - (1) The representation of one client will be directly adverse to another client; or
  - (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the personal interests of the lawyer, including family and domestic relationships.

I.R.P.C. 1.7(a)(1) & (2).

Loyalty and independent judgment are "essential elements in the lawyer's relationship to a client." I.R.P.C. 1.7 Comment [1]. Concurrent conflicts of interest "can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests." *Id.* Loyalty to a current client prohibits "undertaking representation directly adverse to that client without that client's informed consent." *Id.* at Comment [6]. Thus, absent consent, a "lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated." *Id.*

Accepting as true the statement of J, B & C in its Reply Brief on the Motion to Dismiss regarding representation of the Trust, J, B & C holds a duty to provide loyal and independent judgment to the Trust. In Idaho, a Trust does not have interests separate from that of its beneficiaries. The Idaho Supreme Court has held that a trustee cannot represent a trust in a *pro se* capacity, and must employ a lawyer for that purpose, because "[t]he trustee would be representing the interests of others, i.e. the beneficiaries, and therefore would be engaged in the unauthorized practice of law." *Indian Springs, LLC v. Indian Springs Land, LLC*, 147 Idaho 737, 745, 215 P.3d 457, 465 (2009). The Court has also held that in limited circumstances, an attorney has a duty to the beneficiaries under a testamentary instrument. *Harrigfeld v. Hancock*, 140 Idaho 134, 139, 90 P.3d, 884, 889 (2004) ("An attorney preparing testamentary instruments

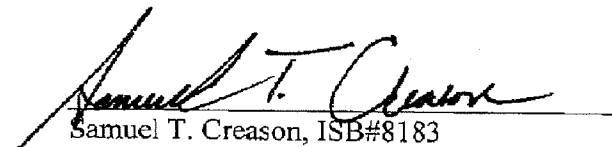
owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so to effectuate the testator's intent as expressed in the testamentary instrument."). While no authority appears to exist directly on point in Idaho, there is case law from foreign jurisdictions that establish a duty between the attorney for the trust and the trust beneficiaries. "An attorney who acts as counsel for a trustee provides advice and guidance as to how that trustee may and must act to fulfill his obligations to all beneficiaries. It follows that when an attorney undertakes a relationship as an advisor to a trustee, he in reality also assumes a relationship with the beneficiary akin to that between trustee and beneficiary." *Morales v. Field, Degoff, Huppert and McGowan*, 99 Cal.App. 3d, 307, 316 (Ct.App. 1st Div. 3).

Ms. Seubert's statement at the May 17 hearing made clear that the position espoused in the filings was Ms. Johnson's personal position, not that of the Trust. After being presented with the consequences of that limited representation, J, B & C now takes the position that it can and always has represented Ms. Johnson, personally, and the Trust. Here, Ms. Johnson's position is that any damage done to the Trust res should be ignored under the doctrine of abatement. She argues that this proposition is true, regardless of whether she engaged in improper conduct while acting as trustee. This is, quite simply, not a position that the Trust can or should take. The Trust would be arguing for an interpretation of law and equity that frustrates the plain language of the Trust and the clear intent of the trustors to effect an equal distribution between children. The Trust would be arguing for an interpretation of law and equity that does not allow the Trust to recover for its damages. J, B & C has an actual existing conflict of interest between representing Ms. Johnson and the Trust, of which the Estate is a beneficiary.

### III. CONCLUSION

The Estate requests that the Court order J,B & C be disqualified as attorneys for the Trust.

DATED this 3rd day of June, 2013.

  
Samuel T. Creason, ISB#8183

MEMORANDUM IN SUPPORT OF THE ESTATE OF  
JOHN CORNELL'S MOTION TO DISQUALIFY THE  
LAW FIRM OF JONES, BROWER & CALLERY, PLLC - 4

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston, ID 83501  
(208) 743-1516; Fax: (208) 746-2231



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21 day of June, 2013, I filed the foregoing **MEMORANDUM IN SUPPORT OF THE ESTATE OF JOHN CORNELL'S MOTION TO DISQUALIFY THE LAW FIRM OF JONES, BROWER & CALLERY, PLLC** with the Clerk of the Court, and provided a copy to the following persons:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501

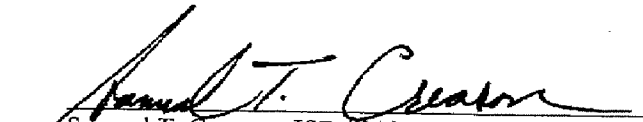
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Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
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Samuel T. Creason, ISB #8183

Case No. CV 2012-277  
Filed 6/4/2013  
at 5:05 o'clock P M  
By Carrie Bird Clerk  
ja Deputy

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

COURT MINUTES

CV-2012-0000277

The Matter of Michael S Cornell

Hearing type: Motion to Dismiss

Hearing type: Motion Hearing

Hearing date: 06/04/2013

Time: 4:11 PM – 5:01 PM

Judge: Randall W. Robinson

Courtroom: 002

Court reporter: None

Minutes Clerk: Jodie

Tape Number: CV473-2

4:11 The Honorable Randall W. Robinson presiding.

Present in Court:

Samuel Creason, Karin Seubert, Darrel Aherin

4:12 Ms. Seubert – Explains and Clarifies Issues

4:19 Mr. Creason – Response to issues of Trust; Representation Issue; Counsel for the  
The Trust?

4:25 Colloquy between Court and Counsel

4:57 Mr. Creason and Ms. Seubert - Rest

4:57 Court – Explains and is Appreciative of each Attorney and their Briefings  
- All are Legitimate legal issues – possible Compromise by the parties  
- Will issue a Written Decision as soon as possible

4:59 Mr. Creason – submitted an order in the Probate case, CV2012-439  
'Amended Order Appointing Personal Representative of the Estate of  
John Henry Cornell' clarifying language of the original order

Court – Approves and signs the Amended Order

5:01 Court is in Recess

**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813

FILED 6/4/2013 AT  
3:11 pm CLERK OF DISTRICT COURT  
BY CS LEWISTON, IDAHO

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**ORDER AUGMENTING RECORD**

This matter having been called for hearing on June 4, 2013 on Appellee's *Motion to Augment Record*; the parties having appeared by and through their attorneys of record; the Court having considered the oral argument presented and record of the case; and good cause shown, IT IS HEREBY ORDERED that the clerk's record is hereby augmented to include the following documents from the collateral matter *In the Matter of the Estate of John H. Cornell, deceased*, Clearwater County Case No. CV 2012-00439, certified copies of which are on file with this Court:

1. Order of Appointment of Temporary Personal Representative entered November 15, 2012;
2. Order Appointing Personal Representative entered February 12, 2013; and
3. Registry of Action as of May 7, 2013.

DATED this 4th day of June, 2013.

  
JUDGE MICHAEL J. GRIFFIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *ORDER AUGMENTING RECORD* was, this 4th day of June, 2013,

\_\_\_\_\_ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☒ hand-delivered;  
☒ mailed, postage pre-paid,  
by first class mail; or  
\_\_\_\_\_ transmitted via facsimile

to:

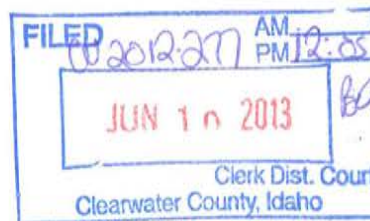
Darrel W. Aherin  
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By Christy L. Hering  
Clerk of Court





Theodore O. Creason, ISB #1563  
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 Attorneys for Personal Representative  
 Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:	)	Case No. CV 2012-00277
	)	
THE REVOCABLE FAMILY TRUST OF	)	<b>BRIEF OF ESTATE OF JOHN H.</b>
MICHAEL S. CORNELL AND ARLIE M.	)	<b>CORNELL</b>
CORNELL.	)	
	)	<b>RE: APPEAL OF MARGARET</b>
	)	<b>WATKINS</b>
	)	

COMES NOW Kareen Cornell, Personal Representative of the Estate of John Henry Cornell, by and through her attorney of record, Theodore O. Creason of Creason, Moore, Dokken & Geidl, PLLC, and files this Brief in response to the Brief of Margaret Watkins in support of her appeal.

Margaret Watkins appeals the February 15, 2013 Judgment of the Magistrate Court dismissing all claims pursued on behalf of John Cornell, in his name only, by Margaret Watkins. Ms. Watkins served her May 13, 2013 Brief in Support of Appeal upon the attorney of record for the Estate of John Henry Cornell, Theodore O. Creason. Though the Magistrate Court solicited

**BRIEF OF ESTATE  
 RE: WATKINS' APPEAL - 1**

Creason, Moore, Dokken & Geidl, PLLC  
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input from the Estate's attorney prior to issuing its judgment, the Estate was not a party to the appealed action at the time of the grant of judgment. Ms. Watkins chose to pursue this matter without substituting the Estate into the action pursuant to Idaho Rule of Civil Procedure 25(a)(1). Further, the Magistrate Court did not treat the Estate as a party to that action. Rather, the court invited the Estate to file its own petition for any claims held against THE REVOCABLE FAMILY TRUST OF MICHAEL S. CORNELL AND ARLIE M. CORNELL, which the Magistrate Court would consider under the same cause number. While the Estate recognizes that it may encounter some of the same legal reasoning appealed in this matter—and the Estate recognizes that it may challenge that reasoning through its own appeal at a future date—the Estate declines any invitation to participate in this appeal as a pseudo-party and, thereby, waive its right to a separate and distinct judicial process.

The Estate limits its brief in this matter to the purpose of clarifying its position, or lack thereof, in this appeal.

DATED this 10th day of June, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Theodore O. Creason, ISB #1563

Attorneys for P.R. of Estate, Kareen Cornell



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of June, 2013, I filed the foregoing BRIEF OF ESTATE OF JOHN H. CORNELL RE: APPEAL OF MARGARET WATKINS with the Clerk of the Court, and provided a paper copy to the following persons:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

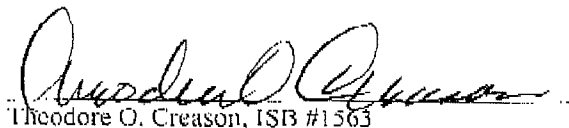
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FIRST-CLASS MAIL  
HAND DELIVERED  
OVERNIGHT MAIL  
FAX TRANSMISSION

  
Theodore O. Creason, ISB #1563





**Karin Seubert.**  
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 208/743-3591  
 Idaho State Bar No. 7813

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
 MICHAEL S. CORNELL AND ARLIE M. )  
 CORNELL. )

Case No. CV 2012-00277

**BRIEF IN OPPOSITION TO APPEAL**

COMES NOW Appellee Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., hereby submits this *Brief in Opposition to Appeal*.

**I. FACTS AND PROCEDURAL BACKGROUND**

Michael S. Cornell and Arlie M. Cornell established the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell on November 1, 1996. See Exhibit A to *Affidavit of Karin Seubert* dated September 14, 2012 (hereinafter "Trust"). Through said trust, Mr. and Mrs. Cornell named their two children, Toni C. Johnson and John H. Cornell, as the beneficiaries of the trust upon Mr. and Mrs. Cornell's deaths. *Id.* at § 4.03. Arlie M. Cornell died on November 9, 2008 and Michael S. Cornell died on December 15, 2009. See *Petition for Supervised Administration and Removal of Trustee*, ¶ 2.

BRIEF IN OPPOSITION TO APPEAL

-1-

On July 11, 2012, John H. Cornell initiated this proceeding. *Petition for Supervised Administration and Removal of Trustee*. John H. Cornell died on August 20, 2011 leaving no issue. *Affidavit of Karin Seubert* at ¶ 2.

Respondent Toni C. Johnson filed a *Motion to Dismiss* on September 17, 2012 seeking to dismiss the *Petition for Supervised Administration and Removal of Trustee* on the basis that the claims of John H. Cornell were extinguished by his death.

On November 15, 2012, in the probate action concerning the Estate of John H. Cornell, deceased, Margaret Watkins was appointed as Temporary Personal Representative of the Estate of John H. Cornell, deceased. See *Order of Appointment of Temporary Personal Representative*, Clearwater County Case No. CV 2012-00439 dated November 15, 2012.

On February 12, 2013, in the probate action concerning the Estate of John H. Cornell, deceased, Kareen Cornell was appointed as personal representative of the Estate of John H. Cornell, deceased, thereby terminating the prior temporary appointment of Margaret Watkins. See *Amended Order Appointing Personal Representative*, Clearwater County Case No. CV 2012-00439, dated June 4, 2013.

On February 15, 2013, the Magistrate Court entered its *Memorandum Opinion and Judgment for Dismissal*, which dismissed the *Petition for Supervised Administration and Removal of Trustee* on the basis that the claims raised in said Petition were extinguished by the death of John H. Cornell. Margaret Watkins filed her *Notice of Appeal* on March 26, 2013.

Toni C. Johnson requests that this Court affirm the decision of the Magistrate Court on the grounds that, first, Margaret Watkins lacks standing to appeal said *Judgment for Dismissal*, and, second, that no reversible error has occurred because said *Judgment* is well based in fact and in law.

## II. ARGUMENT

### 1. Margaret Watkins has no standing to appeal the ruling of the Magistrate Court.

Under Idaho law,

Standing is a preliminary question to be determined by this Court before reaching the merits of the case. The doctrine of standing focuses on the party seeking relief and not the issues the party wishes to have adjudicated. To satisfy the requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury. The alleged injury must be to the litigant whose standing is at issue.

*Abolafia v. Reeves*, Idaho Supreme Court Case No. 38189-2010, 277 P.3d 345 (April 26, 2012) (quoting *Troutner v. Kempthorne*, 142 Idaho 389, 392, 128 P.3d 926, 929 (2006); *Young v. City of Ketcham*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002); *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989)).

In her Notice of Appeal, Margaret Watkins states:

Margaret Watkins, an interested person, has a right to appeal because she was appointed temporary personal representative and defended Toni Johnson's Motion for Summary Judgment. The Estate has a right to appeal to the District Judge Division of the District Court in the County of Clearwater the [Judgment for Dismissal] pursuant to Section 17-207(7) of the Idaho Code.

*Notice of Appeal* at ¶ 2. She asserts in her supporting brief that "[t]his appeal is made by one of the beneficiaries of the trust, John Cornell." *Brief in Support of Appeal* at 1. This assertion is not supported by the record of the case.

The termination of Margaret Watkins' appointment as temporary personal representative of the Estate of John H. Cornell, deceased, became effective February 12, 2013. *Amended Order Appointing Personal Representative*, Clearwater County Case No. CV 2012-00439, dated June 4, 2013. The subject *Judgment for Dismissal* was entered on February 15, 2013. Said Notice of Appeal was dated March 25, 2013. *Id.*

Termination of appointment of a personal representative ends the right and power pertaining to the office of personal representative and terminates the personal representative's authority to represent the estate in any pending or future proceeding. I.C. § 15-3-608. Here, Margaret Watkins' authority related to the Estate of John H. Cornell terminated as of February 12, 2013. Whether the Estate had a right to appeal has no bearing on Margaret Watkins' standing to pursue an appeal because her authority related to the Estate had been extinguished. Therefore, when Margaret Watkins filed her *Notice of Appeal* on March 25, 2013, she had no authority to act on behalf of the Estate or John H. Cornell personally, thus she could not have been making this appeal on behalf of "one of the beneficiaries of the trust, John Cornell," as she asserts in said *Notice*.

Because she had no authority to act on behalf of the Estate, then Margaret Watkins must allege or demonstrate an injury in fact to her individually and a substantial likelihood that the judicial relief requested will prevent the claimed injury to her individually. See *Abolafia v. Reeves*, Idaho Supreme Court Case No. 38189-2010, 277 P.3d 345 (April 26, 2012) (quoting *Troutner v. Kempthorne*, 142 Idaho 389, 392, 128 P.3d 926, 929 (2006); *Young v. City of Ketchum*, 137 Idaho 102, 104, 44 P.3d 1157, 1159 (2002); *Miles v. Idaho Power Co.*, 116 Idaho 635, 641, 778 P.2d 757, 763 (1989)). The record of the case reflects that Margaret Watkins has no such injury that would grant her standing to pursue an appeal.

In her Notice of Appeal, Ms. Watkins refers to herself as "an interested person." The term "interested person" includes "heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding." I.C. § 15-1-201(25). Ms. Watkins is not a beneficiary of the subject Revocable Family Trust of Michael S. Cornell and

Arlie M. Cornell, and has asserted no property right in or claim against the Trust in her individual capacity. See *Affidavit of Karin Seubert* dated September 14, 2012 at Exh. A and B; *Registry of Action, In the Matter of the Estate of John H. Cornell, deceased*, dated May 14, 2013. She has not filed a creditor's claim in the estate of John H. Cornell, so the Court cannot conclude that she is a creditor for purposes of the Estate of John H. Cornell. See *Registry of Action, In the Matter of the Estate of John H. Cornell, deceased*, dated May 14, 2013. Even if Ms. Watkins were a creditor of the Estate of John H. Cornell, deceased, she would not be a party aggrieved by the subject *Judgment for Dismissal* because only the Estate, through the authorized personal representative, has authority to prosecute claims against Toni Johnson in her personal capacity or in her capacity as trustee of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell.<sup>1</sup> I.C. § 15-3-715(22).

For these reasons, Margaret Watkins' appeal should be dismissed for lack of standing.

**2. No reversible error has been shown.**

Before the Magistrate Court, Margaret Watkins, as then personal representative of the Estate of John H. Cornell, argued that John H. Cornell's Petition set forth both claims for breach of fiduciary duty and for breach of trust, arguing that said breach of trust claim sounds in contract. *Response to Motion to Dismiss* at 8-10. Margaret Watkins now argues that the Magistrate Court committed reversible error when it failed to recognize a potential breach of contract claim. *Brief in Support of Appeal* at 2-4.

First, said argument is not preserved on appeal because Margaret Watkins failed to raise it

---

<sup>1</sup> It is Respondent's position that, after her appointment, current personal representative Kareen Cornell had the authority to appeal said *Judgment for Dismissal* on behalf of the Estate, thus pending the outcome of Margaret Watkins' appeal, the Estate is bound by said decision. The Estate takes the position that it is not a party to this appeal, nor bound by the *Judgment for Dismissal*. See *Brief of Estate of John H. Cornell re: Appeal of Margaret Watkins* dated June 10, 2013.

before the Magistrate Court. *Barmore v. Perrone*, 145 Idaho 340, 343, 179 P.3d 303, 306 (2008) (citations omitted).

Second, to the extent Appellant is now merely interchanging the descriptor of "breach of contract" for "breach of trust," Margaret Watkins provides no case law to support the conclusion that a breach of trust claim arises in contract. Before the Magistrate Court, Margaret Watkins cited to *Cruzen v. Boise City*, 58 Idaho 406, 74 P.2d 1037 (1937), to support her argument that a breach of trust arises in contract. *Response to Motion to Dismiss* at 8. However, said case involved a dispute over liability a municipal corporation owes to bondholders for a deficiency in the collection of assessments due to embezzlement by the city clerk of the levied special assessments. *Id.* at 408, 74 P.2d at 1039. The *Cruzen* Court held that the subject bonds constituted an enforceable contract between the city and its bondholders and was not time barred. *Id.* at 415-417, 74 P.2d at 1046-48 (declining to consider whether statute concerning safekeeping of money by a county or the statute of limitations for breach of contract was implicated).

The relationship between a bondholder and municipal corporation issuing bonds clearly conforms with the general requirements of an enforceable contract: offer, acceptance, meeting of the minds, and consideration. *Thompson v. Pike*, 122 Idaho 690, 838 P.2d 293 (1992); *Haener v. Adam Co. Highway Dist.*, 108 Idaho 170, 697 P.2d 1184 (1985); *Gyurkey v. Babler*, 103 Idaho 663, 651 P.2d 928 (1982); *Vance v. Connell*, 96 Idaho 417, 529 P.2d 1289 (1974).

No such contractual relationship between the successor trustee and beneficiary of a trust exists. The existence and involvement of a written document does not establish a contractual relationship nor a potential claim against Toni Johnson grounded in contract.

Instead, similar to the attorney-client relationship at issue in *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012), the duties owed by a trustee to trustee beneficiaries are defined by

statute. The trust documents at issue contain no greater requirements than are set forth in the Uniform Probate Code and Principal and Income Act. See *Affidavit of Karin Seubert* dated September 14, 2012 at Exh. A and B. The standard of care in the trust document is essentially the same as in any trustee-beneficiary relationship. *Id.* As such, a claim for breach of said standard of care is a tort, and does not sound in contract as Margaret Watkins suggests. See *Id.* at 620, 272 P.3d at 1251. See also *Jones v. Kootenai County Title Ins. Co.*, 125 Idaho 607, 614, 873 P.2d 861, 868 (1994) ("a claim for breach of fiduciary duty is a negligence action in which the duty to act is created by the relationship between the parties.")

Last, Margaret Watkins did not raise in her *Brief in Support of Appeal* the issue of whether the Magistrate Court properly applied Idaho Code Section 5-327 in its *Judgment for Dismissal*, therefore it is not subject to review by the District Court and is not addressed in this response brief. See *State v. Hoisington*, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983) ("The Supreme Court will not review an issue that was not raised or argued in the briefs.")

For these reasons, Margaret Watkins' appeal should be dismissed for failure to demonstrate reversible error.

### III. CONCLUSION

Based on the foregoing, Appellee Toni Johnson respectfully requests that the District Court dismiss the appeal of Margaret Watkins based upon lack of standing and due to her failure to demonstrate reversible error. Appellant Toni Johnson respectfully requests an award of costs and attorney fees against Margaret Watkins pursuant to Idaho Code Section 12-121 on the basis that the appeal was brought and pursued frivolously, unreasonably and without foundation.

DATED this 10 day of June, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By

Karin Seubert

Karin Seubert

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *BRIEF IN OPPOSITION TO APPEAL* was, this 10 day of June, 2013,

- ☐ hand-delivered by providing a copy to: Valley Messenger Service;
- ☐ hand-delivered;
- ☐ mailed, postage pre-paid,
- ☒ by first class mail; or
- ☐ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By

Karin Seubert

Karin Seubert

BRIEF IN OPPOSITION TO APPEAL

-8-



**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
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208/743-3591  
Idaho State Bar No. 7813

FILED 6/11/2013 AT  
BY 1:29 pm df OF IDAHO

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**SECOND ORDER AUGMENTING  
RECORD**

The Appellant Margaret Watkins, by and through her attorney of record, Darrel Aherin of Aherin, Rice and Anegon, the Appellee Toni Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and the Estate of John H. Cornell, by and through its attorney, Samuel Creason of Creason, Moore, Dokken and Geidl, P.L.L.C., having stipulated on the record in open court on June 4, 2013 before the Honorable Randall W. Robinson to augmentation of the clerk's record as set forth below, and good cause shown, IT IS HEREBY ORDERED that the clerk's record is hereby augmented to include the Amended Order Appointing Personal Representative of the Estate of John Henry Cornell entered on June 4, 2013 in the collateral matter *In the Matter of the Estate of John H. Cornell, deceased*, Clearwater County Case No. CV 2012-00439, a certified copy of which is attached hereto as Exhibit A.

DATED this 11<sup>th</sup> day of June, 2013.

  
JUDGE MICHAEL J. GRIFFIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *SECOND ORDER AUGMENTING RECORD* was, this 11<sup>th</sup> day of June, 2013,

\_\_\_\_\_ hand-delivered by providing a  
copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
☒ mailed, postage pre-paid,  
by first class mail; or  
\_\_\_\_\_ transmitted via facsimile

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower and Callery, P.L.L.C.  
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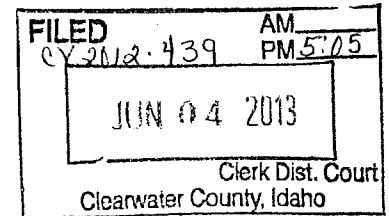
Theodore O. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
P.O. Drawer 835  
Lewiston, ID 83501

By

  
Clerk of Court



SECOND ORDER AUGMENTING RECORD -2-



Theodore O. Creason, ISB #1563  
Samuel T. Creason, ISB #8183  
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Attorney for Surviving Spouse  
Of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

IN THE MATTER OF THE ESTATE

Case No. CV 2012-439

OF

JOHN HENRY CORNELL,

Deceased.

**AMENDED ORDER APPOINTING  
PERSONAL REPRESENTATIVE  
OF THE ESTATE OF JOHN  
HENRY CORNELL**

The petitioner Kareen Cornell for an adjudication of intestacy and determination of heirs having come before the Court on February 6, 2013, the Court makes the following findings:

1. John Cornell died on August 20, 2012, at the after of 47 years. At the time of his death, the decedent was domiciled in Minidoka County, State of Idaho.

**ORDER APPOINTING PERSONAL  
REPRESENTATIVE OF THE ESTATE OF JOHN  
HENRY CORNELL — 1**

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston ID 83501  
(208)743-1516; Fax(208)746-2231

Exhibit A

2. No adjudication has been made of whether Decedent died intestate. No Will has been admitted to probate.
3. The decedent was survived by the following persons:

<u>Name</u>	<u>Address</u>	<u>Relationship</u>
Kareen Cornell	P.O. Box 361 Heyburn, Idaho 83336	Spouse

4. Movant's Petition sets forth her priority as surviving spouse to appointment as personal representative of the Estate.

WHEREFORE, IT IS HEREBY ORDERED that Kareen Cornell is appointed Personal Representative of the Estate of John Henry Cornell and terminates the appointment of Margaret Watkins as acting temporary personal representative effective February 12, 2013.

DATED this 4th day of June, 2013 *none per time to February 12, 2013*

  
 RANDALL W. ROBINSON, Judge

STATE OF IDAHO

County of Clearwater

I hereby certify that the foregoing is a full, true and correct copy of an instrument as the same now remains on file and of record in my office. WITNESS my hand and official seal hereto affixed.

this 4th day of June, A.D. 2013  
 CARRIE BIRD, CLERK OF THE DISTRICT  
 COURT EX-OFFICIO AUDITOR & RECORDER

By Deputy 

ORDER APPOINTING PERSONAL  
 REPRESENTATIVE OF THE ESTATE OF JOHN  
 HENRY CORNELL -- 2

Creason, Moore, Dokken & Geidl, PLLC  
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IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

MEMORANDUM OPINION  
RE: KAREEN CORNELL

This case involves the issue as to whether Kareen Cornell, the widow of John H. Cornell, may pursue the claims of John H. Cornell against Toni Johnson for wrongfully applying the proceeds of a trust to her personal needs rather than distributing John H. Cornell's share to Kareen Connell.

Kareen Cornell, as personal representative of the Estate of John H. Cornell and surviving spouse of John H. Cornell, filed a Petition for Supervised Administration and Court Ordered Distribution ("Petition") of a trust created by the parents of John H. Cornell and Toni Johnson. Toni Johnson, the sole trustee for the trust and a named beneficiary of the trust, filed a Motion to Dismiss Kareen Cornell's Petition on the basis that Kareen Cornell's claims against Toni Johnson, derived from John H. Cornell's claims while alive, are abated with the death of John H. Cornell. The Motion to Dismiss, the previous Judgment for Dismissal filed in this case regarding the Petition filed by John H. Cornell, affidavits of the parties, the parties' Memoranda, the oral argument of the parties, and the file have been carefully considered.

MEMORANDUM OPINION-1  
RE: KAREEN CORNELL

I. Statement of Facts.

On November 1, 1996, Michael Cornell and Arlie Cornell, husband and wife, and parents to Toni Johnson and John H. Cornell, created a revocable family trust ("Trust"). The Trust provides, "On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: Toni C. Johnson and John H. Cornell." Trust § 4.03.

On November 9, 2008, Arlie Cornell passed away. On August 6, 2009, Michael Cornell signed the First Amendment of the Cornell Trust which named Toni Johnson ("Toni") as sole trustee/successor trustee instead of Toni and John H. Cornell ("John") jointly serving in that capacity as provided for in the original Trust. On December 15, 2009, Michael Cornell, the last Trustor, passed away.

John was experiencing serious health and financial problems at the time his father, Michael Cornell, passed away. John failed to obtain necessary medical care because of his lack of finances. John contacted his sister, Toni, regarding the status of the Trust following his father's death, but Toni refused to speak to him. John wrote several letters and made several phone calls to the attorney for the estate requesting information as to the status of the Trust without a response from the attorney. In his third letter to the attorney dated September 17, 2010, John wrote, "Is it fair that Toni has a place to live and I do not have a place to live. Why should I incur living expenses and she is in complete control of everything, living off the money in the trust and living free in my parent's house which is also my house?"

In the nearly two (2) years from the last trustor's death through John's death, Toni failed to distribute any part of the Trust to John even while she lived rent free in the home that is included in the Trust. Toni used funds from the Trust for her personal benefit. Toni has not distributed any of the funds from the Trust other than for her own use.

John received \$3000 as the beneficiary of a life insurance policy on his father's life. Upon Toni's demand that he turn the money over to her, he sent a check for \$2500 to Toni and retained \$500 for living expenses.

On July 11, 2012, John filed a Petition for Supervised Administration and Removal of Trustee alleging breach of Toni's fiduciary duty to settle and distribute the Trust, Toni's mismanagement of the estate by paying her own personal expenses while failing to pay John his one-half share of the estate, and Toni's failure to provide an inventory of the assets.

On August 20, 2012, John committed suicide. In the case of death of one of the beneficiaries, the Trust provides at 4.03(a),

If any child, for whom a share of the Trust Estate has been set aside, should die prior to the above distribution, then the Trustee shall distribute all of such deceased child's share of the Trust Estate to his or her surviving issue in equal shares . . . If there is no surviving issue,, then all of the deceased child's share of the Trust Estate shall be added to the shares set aside for the benefit of the Trustors' other living child ...."

John's wife, Kareen Cornell, survives him. However, John left no issue. Thus, the Trust proceeds, in the absence of any distribution prior to John's death, will go in its entirety to Toni.

## II. Proceedings to date.

On July 11, 2011, John H. Cornell filed a Petition for Supervised Administration and Removal of Trustee regarding the Trust through his attorney, Darrell Aherin. On August 11, 2011, John died leaving his wife, Kareen, and no issue.

On September 17, 2012, Toni filed a Motion to Dismiss the Petition on the basis that John's claims of Toni's malfeasance in administering the Trust were extinguished by his death. Karen Seubert submitted briefing for Toni and Darrell Aherin submitted briefing for the deceased John and John's aunt, Margaret Watkins, who was appointed as the temporary personal representative for John's estate.

The hearing on the Motion to Dismiss was originally scheduled for November 27, 2012. John's widow, Kareen Cornell, made her first appearance in this case on that date with Theodore Creason appearing for her. At Kareen Cornell's request, the hearing was continued. Oral argument was conducted on January 8, 2013 on Toni's Motion to Dismiss John's Petition with Ms. Seubert and Mr. Aherin presenting argument. Mr. Creason failed to appear due to a misunderstanding regarding the hearing. Another hearing was conducted on February 6, 2013 at which Ms. Seubert appeared for Toni, Mr. Aherin appeared for John and Margaret Watkins, and Mr. Creason appeared for Kareen Cornell. Briefing was provided by Mr. Creason and Ms. Seubert prior to the hearing in addition to the briefs that has been previously submitted by Ms. Seubert and Mr. Aherin.

Ms. Seubert sought dismissal of Mr. Aherin's Petition on the basis of abatement of John's claims upon his death and that no substitution had been filed for John upon his death. This Court on the basis of solely the abatement issue dismissed John's



Petition. On February 9, 2013, this Court orally announced its decision granting Toni's Motion to Dismiss and then issued on February 15, 2013, Judgment for Dismissal and a supporting Memorandum Opinion. Kareen was given twenty (20) days to submit a Petition and make claims against Toni if she wished to proceed further in this case.

On February 26, 2012, Kareen Connell, as the newly appointed personal representative of the Estate of John H. Cornell and as John's surviving spouse, filed a Petition for Supervised Administration and Court Ordered Distribution. The Petition alleges that Toni's misuse of the Trust funds constitutes conversion and violates additional equitable principles. The Petition alleges that Kareen is entitled in equity as a constructive trust to the one-half share of the Trust John would have received had he survived.

On March 4, 2013, Toni filed her Motion to Dismiss Kareen's Petition. On May 7, 2013, Toni filed her Memorandum of Law in Support of her second Motion to Dismiss. On May 22, 2013, Samuel Creason filed his Memorandum in Opposition and on May 28, 2013, Ms. Seubert filed her Reply Brief. Oral argument was conducted on June 4, 2013 with Samuel Creason representing Kareen and Toni represented by Karen Seubert.

### III. Legal Analysis.

#### A. Standard.

Affidavits have been filed and considered. In considering matters outside the pleadings on a motion to dismiss, such motion must be treated as a motion for summary judgment. I.R.C.P. 56(c); *Hellickson v Jenkins*, 118 Idaho 273, 276, 769 P.2d 150, 153 (Ct. App. 1990).

The standard for granting a motion for summary judgment has been often repeated by the appellate courts.

All disputed facts are to be construed liberally in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party. *Bonz v. Sudweeks*, 119 Idaho 539, 541, 808 P.2d 876, 878 (1991). Summary judgment is appropriate if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *McCoy v. Lyons*, 120 Idaho 765, 769, 820 P.2d 360, 364 (1991).

*Thomson v. Idaho Ins. Agency, Inc.*, 126 Idaho 527, 529, 887 P.2d 1034, 1036 (1994).

With respect to the abatement issue presented by Toni's Motion to Dismiss, there is no genuine issue of any material fact. I find it appropriate to consider Toni's motion to dismiss as a motion for summary judgment. Toni's Motion for Summary Judgment raises two issues: (1) Do John's claims survive his death under the common law? (2) If not, has the Idaho legislature abrogated the common law and provided for the survivability of John's claims?

#### B. Discussion.

##### 1. Standing

Kareen argues that Toni lacks standing to make her arguments regarding the Trust because she is a contingent beneficiary. The Supreme Court in *Carl H.*

*Christensen Family Trust v. Christensen*, 133 Idaho 866, 870, 993 P.2d 1197, 1201 (1999) noted that a party to an action must actually benefit from the proceeding.

Idaho Rule of Civil Procedure 17(a) provides that "[e]very action shall be prosecuted in the name of the real party in interest." I.R.C.P. 17(a). A real party in interest "is the person who will be entitled to the benefits of the action if successful, one who is actually and substantially interested in the subject matter." *State, Dep't of Law Enforcement v. One 1990 Geo Metro*, 126 Idaho 675, 680, 889 P.2d 109, 114 (Ct.App.1995) (quoting *Carrington*

*v. Crandall*, 63 Idaho 651, 658, 124 P.2d 914, 917 (1942) (decision under statutory precursor to I.R.C.P. 17(a))).

133 Idaho at 870, 993 P.2d at 1201.

The Supreme Court in *Christensen* held that the prospect of the Plaintiffs, as named beneficiaries under the trust, ever gaining any benefit from the trust was too remote to justify designating the Plaintiffs as a real party in interest. “(T)he co-plaintiffs, as children of Carl and Lenna, will have an interest in the assets of the Family Trust only if (1) Carl and Lenna do not exhaust the trust corpus during their lifetimes, and (2) funds remain after \$100,000 is distributed to the Missionary Trust. Because the co-plaintiffs have a mere expectancy, they will not be entitled to the benefits of a successful suit.” 133 Idaho at 870, 993 P.2d at 1201. The Supreme Court upheld the dismissal of the Plaintiffs’ case on the basis that they were not a real party in interest.

The facts of this case are substantially different than present in *Christensen*. In this case, the grantors are deceased. Toni is the only person who has had access to the Trust and has used funds from the Trust. In fact, the gravamen of Kareen’s petition is that Toni has misapplied the Trust for her own benefit to the exclusion of her deceased husband. If Kareen is granted the relief she seeks, Toni will be required to disgorge money she has misused and perform an accounting for all property in the trust. Kareen does not explain how Toni can be a real party in interest against whom relief is sought, but that Toni is not a real party in interest when she interposes defenses.

There is no living beneficiary under the Trust other than Toni. Even though the Trust has not been yet been officially distributed by court order, Toni has used the proceeds as if the Trust disposition had been approved. She is the only person who is

named as trustee and the only person alive who is identified as beneficiary. The only contingency remaining is actually distributing the proceeds. Toni is clearly a real party in interest. If she is successful in this case, the entire Trust will be hers to do with as she wishes.

Kareen argues that inartful words by Toni's counsel that she does not represent the Trust deprive Toni of the status of a real party in interest. To the contrary, Toni's personal interest and the Trust coincide since Toni is the only beneficiary and trustee still living.

There is no factual issue as to whether Toni is a real party in interest. Kareen's argument is rejected.

## 2. Law of the Case.

Toni argues that this Court's previous Judgment with respect to the claims made by Mr. Aherin on behalf of Margaret Watkins and John requires dismissal of Kareen's Petition under the law of the case doctrine. The law of the case only applies to a decision made by an appellate court. *Swanson v. Swanson*, 134 Idaho 512, 516, 5 P.3d 973, 977 (2000). No appellate decision has been rendered on this case. Therefore, Toni's argument is rejected.

Foreclosure of Kareen's ability to present arguments on her behalf would be especially unfair in this case. On the one hand, Toni has argued and will presumably argue at the appellate stage that any appeal taken by Margaret Watkins must be dismissed because Margaret Watkins is not a real party in interest as no substitution was ever filed for John following his death and Margaret Watkins is no longer personal representative. Kareen as a nonparty was limited to making arguments with respect to

the Petition filed by Mr. Aherin on behalf of her husband and pursued by Margaret Watkins. Under these circumstances, Kareen, as John's deceased widow and personal representative of John's estate, must be allowed to present her arguments to the Court as a real party in interest.

This Court adheres to the reasons set forth in its Memorandum Opinion dated February 15, 2013 dismissing the Petition filed by John H. Cornell. However, Kareen makes new arguments why her Petition should withstand Toni's Motion to Dismiss.

It is important to note that Kareen derives all her claims from the wrongs she alleges Toni committed against John. Toni asserts in her Motion that all the derivative claims asserted by Kareen are abated by John's death.

### 3. Abatement.

Kareen in her Petition alleges that Toni violated her fiduciary duties as a trustee to John under several provisions of the Trust Administration Act, Idaho Code § 7-301 et. seq. Petition at §§ 3.14, 3.15, 3.16, 3.17, 3.18, and 3.19. This argument has already been considered in the original Memorandum Opinion. However, because the analysis in finding the allegations of statutory violations to be abated are pivotal to addressing Kareen's other arguments, this Court's discussion addressing this allegation when dismissing John's Petition will be largely repeated here.

The Supreme Court recently considered in *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012) when the claims of deceased individuals are abated or terminated.

The abatement rule holds that in the absence of a legislative enactment addressing the survivability of a claim, the common law rules govern. See I.C. § 73-116 ("The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all

courts of this state.”); see also *Evans v. Twin Falls Cnty.*, 118 Idaho 210, 215, 796 P.2d 87, 92 (1990). Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate. See *Helgeson v. Powell*, 54 Idaho 667, 674–79, 34 P.2d 957, 960–61 (1934); *Kloepfer v. Forch*, 32 Idaho 415, 417–18, 184 P. 477, 477 (1919).

*Id.* at 619-620.

Thus, in order for John’s claims to survive his death, his claims must sound in contract, and not in tort. The *Bishop* decision is instructive as to how to analyze whether a case sounds in contract or tort for purposes of abatement of the claim. The *Bishop* case involved a legal malpractice claim. Although the malpractice claim arose out of a contractual claim to perform legal services, the Supreme Court held the claim to sound in tort for purposes of abatement.

As this Court previously recognized, “[l]egal malpractice actions are an amalgam of tort and contract theories.” See *Johnson v. Jones*, 103 Idaho 702, 706, 652 P.2d 650, 654 (1982). The tort basis of legal malpractice actions flows from the elements of legal malpractice: “(a) the existence of an attorney-client relationship; (b) the existence of a duty on the part of the lawyer; (c) failure to perform the duty; and (d) the negligence of the lawyer must have been a proximate cause of the damage to the client....” *Id.* (quoting *Sherry v. Diercks*, 29 Wash.App. 433, 437, 628 P.2d 1336, 1338 (1981)). “The scope of an attorney’s contractual duty to a client is defined by the purposes for which the attorney is retained.” *Johnson*, 103 Idaho at 704, 652 P.2d at 652; *Fuller*, 119 Idaho at 425, 807 P.2d at 643 (holding that the tort of legal malpractice is also a breach of the attorney-client relationship). Breach of an attorney’s duty in negligence is a tort. See *Harrigfeld v. Hancock*, 140 Idaho 134, 136, 90 P.3d 884, 886 (2004); *Johnson*, 103 Idaho at 704, 706–07, 652 P.2d at 652, 654–55. The contract basis of legal malpractice actions is the failure to perform obligations directly specified in the written contract. See *Johnson*, 103 Idaho at 704, 706–07, 652 P.2d at 652, 654–55 (holding that a breach of contract claim would arise if the attorney did not do what he promised to do in the contract, e.g., failing to draw up a contract of sale). Thus, under the abatement rule, breach of duty is an action in tort, not contract; that is,

unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney. Breach of that duty is a tort.

*Id.* at 620.

The Idaho Supreme Court's analysis of whether legal malpractice claims are abated is very clearly applicable to this case. This case is a mixed tort and contract case. This case also involves torts arising from a contractual agreement. A tort basis for John's claims against Toni exists just as they were found to exist with respect to the legal malpractice claim in *Bishop*: (a) The existence of a fiduciary relationship is established by Toni being appointed as and acting as a trustee (b) Toni, the trustee, has duties to act in a particular fashion; (c) the alleged failure to meet those duties; (d) the failure of Toni to perform her duties was the proximate cause of John not receiving his share of the Trust during his lifetime.

In *Bishop*, the Court held that

the contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct. If an attorney and client want to provide for a higher standard of care, they may do so by express language in the contract. Here, the standard of care in the contract is essentially the same as in any attorney-client relationship. Because this claim sounds in tort, it abated upon Patricia Shelton's death.

*Bishop v. Owens*, 152 Idaho at 620, 272 P.3d at 1251.

Similarly, in this case, the contours of the duties owed by the trustee to the beneficiary are defined by sources outside the contract: Chapter 7 of the Uniform Probate Code, Idaho Code § 15-7-101 et seq., and the Uniform Principal and Trust Act

at Idaho Code § 68-10-101 et seq. Violation of these fiduciary duties arising under statute is a tort. Therefore, Kareen's claims of malfeasance by Toni arising from violations of statutes are dismissed as they are abated.

Kareen argues that her husband's interest in the Trust arose immediately upon the grantors' death and therefore is not extinguished by his death. Kareen relies upon § 4.03 of the Trust which provides in relevant part, "On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably as possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: Toni C. Johnson and John H. Cornell." Kareen ignores § 4.03(a) of the Trust immediately following which ties entitlement to the recipient being alive at the time of distribution and not the death of the last trustor.

If any child, for whom a share of the Trust Estate has been set aside should die prior to the above distribution, then the Trustee shall distribute all of such deceased child's share to the Trust Estate to his or her surviving issue in equal shares. ... If there is no surviving issue, then all of the deceased child's share of the Trust Estate shall be added to the shares set aside for the benefit of the Trustor's other living child, as hereinafter provided including both of the distributed and the undistributed portions of each such share, to be distributed as an equal part of such other shares.

Kareen fails to point to any state law overriding the express terms of the Trust.

Even if Kareen was able to point to a state statute, she does not explain how that would prevent abatement of the claims Kareen claims on behalf of her deceased husband.

Kareen argues that Toni's failure to turn John's share of the Trust over to him creates a constructive trust over the property that Toni wrongly withheld from John. There are several problems with Kareen's argument.



The doctrine of constructive trust is a legal fiction created in the absence of a legal trust.

Constructive trusts are created by courts of equity whenever title to property is found in one who in fairness ought not to be allowed to retain it. The defendant is treated as if he or she had been an express trustee from the date of the wrongful holding and is required to reconvey the property to the plaintiff. G.G. Bogert & G.T. Bogert, *The Law of Trusts & Trustees* § 471 (1978).

*Klein v. Shaw*, 109 Idaho 237, 240, 706 P.2d 1348, 1351 (Ct. App. 1985).

As this case already addresses a legal trust, there is no necessity to resort to the legal fiction of a constructive trust. Toni's failure to timely provide John his share of the estate is already covered by the Uniform Probate Code. The contours of the duties imposed by the Probate Code supplant equitable considerations.

Second, the circumstances necessitating creation of a constructive trust squarely meets the definition of a tort. The definition of a tort is "(a) civil wrong, other than breach of contract, for which a remedy may be obtained, usu. in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another." TORT, *Black's Law Dictionary* (9th ed. 2009). Kareen requests a constructive trust to address the civil wrong, the breach of duties Toni owed to John. As a cause of action sounding clearly in tort, Kareen's request for a constructive trust must be rejected as abated. *Bishop v. Owens*, 152 Idaho at 619-620, 272 P.3d at 1249-1250.

Kareen argues that her breach of contract claim must be viewed as separate from the breach of fiduciary claim and, as a contract claim, survives John's death. The Supreme Court in *Bishop* addressed the same claim. In the absence of finding that a

higher duty of care is provided for under the Trust agreement than provided under the statute, *Bishop* requires abatement of Kareen's claim. *Bishop v. Owens*, 152 Idaho at 620, 272 P.3d at 1251. Kareen fails to point out any way in which the Trust instrument imposes any duties upon Toni that are not also imposed by the Probate Code. This Court stands by its more detailed analysis when addressing John's claims that the Trust instrument gives no higher duty of care than the duty imposed by the Probate Code. Memorandum Opinion dated February 15, 2013 at 6-8.

Kareen also argues that enforcement of the terms of an oral contractual agreement between John and Toni survives John's death. Kareen argues that a factual issue exists as to an oral agreement that Toni could live in the home that is part of the Trust rent free while she tried to sell it, that she could use the Trust to help pay for her living expenses and that she would divide the proceeds with John when the house and real property sold. Even accepting these facts as true, they do not provide any greater protection for John than already provided under the Trust or state law. Simply stating that proceeds of the estate will be divided equally between the parties merely reinforces the fiduciary duties under the Probate Code and the Trust to ensure John receives his share of the Trust.

Besides, it is not the specific terms of the Trust that govern whether or not Kareen's claims are abated, but rather whether the failure to carry out the terms violates state law in the form of the Probate Code. The Supreme Court's analysis in *Bishop* makes clear that merely changing the terms of the underlying agreement is irrelevant to whether the case is abated unless a higher standard of care is provided for in cases, as here, involving a mixed tort and contract. *Bishop v. Owens*, 152 Idaho at 620, 272 P.3d

at 1251. No higher standard of care is set forth in the oral agreement. Therefore, Kareen's reliance on the oral and written Trust terms defeating abatement of her claims is rejected.

This result is further supported by *Jones v. Runft, Leroy, Coffin & Matthews, Chartered*, 125 Idaho 607, 612, 873 P.2d 861, 866 (1994). The Court observed, "A contract may ... create a state of things which furnishes the occasion for a tort. If the relation of the plaintiff and the defendants is such that a duty to take due care arises therefrom irrespective of contract and the defendant is negligent, then the action is one of tort." *Jones*, 125 Idaho at 612, 873 at 866. As stated above, the duties Kareen asserts Toni breaches arise irrespective of contract. The duties are grounded in the failure to abide by the fiduciary duties imposed by state law regardless of what the contract states.

Kareen seeks to distinguish *Bishop* by relying on several Am.Jur. cites. Kareen argues that the survival of an action depends on the nature of the interest affected. Because property of the Trust is involved, as opposed to physical injury, the claim cannot be abated. 1 Am.Jur. 2d *Abatement, Survival, and Revival* § 51. Kareen also argues that the claims under the Probate Code survive because "(a) cause of action that is founded on a remedial statute survives the death of the party possessing the cause of action." 1 Am.Jur. 2d *Abatement, Survival, and Revival* § 59. Finally, Kareen, citing to 1 Am.Jur. 2d *Abatement, Survival, and Revival* §§ 56 and 60, argues that her equitable claims of conversion and unjust enrichment survive because claims in equity are not abated.

These arguments were addressed in the Memorandum Opinion dated February 15, 2013 filed in this case. While Kareen correctly sets forth these principles, she provides no explanation as to how they are consistent with *Bishop*. The Supreme Court in *Bishop* did not examine whether the claims were equitable or torts done to persons or to property in determining whether the joint contract and tort action survives the death of the party. Nor did the Supreme Court analyze whether the rules of professional conduct are remedial in nature for purposes of surviving the party's death. As Kareen's claims are in the nature of torts, Kareen's claims are abated by John's death. Therefore, Kareen's arguments are rejected.

Kareen also cites *Henshaw v. Miller*, 58 US 212 (1854) in support of her argument. *Henshaw* involved the interpretation of Virginia statutes in determining whether a claim against the estate was abated. The United State Supreme Court held the claim against an executor for a wrong the deceased allegedly committed against the plaintiff was abated. *Henshaw* offers to assistance to Kareen.

Kareen also argues that she is entitled to pursue return of Lot 34 which adjoins the real property of John's parents, the trustors. Kareen argues that John transferred the property to the Trust for convenience because it was contiguous to the parents' property and that John continued to pay taxes and other expenses on the property after it was quitclaimed. Memorandum in Opposition re Motion to Dismiss at 16. In order for Kareen's argument to be considered, there must be specific facts presented by affidavit or deposition supporting the argument.

Once the moving party establishes the absence of a genuine issue of material fact, the burden shifts to the nonmoving party, who must then come forward with sufficient evidence to create a genuine issue of material fact. *Id.* A party opposing a motion for summary judgment "may

not rest upon the mere allegations or denials of that party's pleadings, but the party's response ... must set forth specific facts showing that there is a genuine issue for trial." I.R.C.P. 56(e). Such evidence may consist of affidavits or depositions, but "the Court will consider only that material ... which is based upon personal knowledge and which would be admissible at trial." *Harris v. State, Dep't of Health & Welfare*, 123 Idaho 295, 297–98, 847 P.2d 1156, 1158–59 (1992).

*Sherer v. Pocatello Sch. Dist. No. 25*, 143 Idaho 486, 489-90, 148 P.3d 1232, 1235-36 (2006).

The property in question was transferred to the Trust on January 3, 2007. Affidavit of Theodore O. Creason at Exhibit 5 to Exhibit B. However, there are no specific facts in the record to support the allegations regarding the purpose of the transfer nor that payments were made by John on the property after transfer. The only mention of the property by sworn testimony consists of Toni testifying she had no recollection of John paying money on the property and (2) the implication Toni drew from her brother's circumstances that he may have transferred the property to avoid creditors and any claim by his estranged wife. Affidavit of Theodore O. Creason at 63 ll. 19-24 and at 64 ll. 13-16.

Kareen made no claim in her Petition regarding Lot 34 other than including in the statement of facts that John had deposited Lot 34, which adjoins his parents' property, by quitclaim deed into the Trust. Petition at § 3.8. Nor did Kareen provide specific facts by affidavit or deposition to show that Lot 34 should be treated any different than the other property that is part of the Trust. Toni met her burden in establishing that there is no material issue of fact as to abatement of the claims surrounding the Trust. Kareen's argument must be rejected in the absence of specific facts showing why Lot 34 should be treated differently than the rest of the property held in the Trust.

Kareen argues that the legislature's enactment of Idaho Code § 5-327 abrogates abatement of her claim concerning the diminution of the value of the property interest John held in the property comprising the Trust. This claim has already been addressed in the Memorandum Opinion dated February 15, 2013 at 13-17. The diminution of John's interest in the Trust does not come within any of the listed three types of damages - medical expenses, out of pocket expenses nor lost wages- that a claim such as Kareen's can recover upon, even though otherwise abated. Kareen makes no new argument as to why this analysis is in error. I adhere to my analysis stated in the original Memorandum Opinion and reject Kareen's argument again.

### III. CONCLUSION

Based upon the foregoing Findings of Fact and Conclusions of Law, and there being no material facts in dispute, the Motion to Dismiss filed by Toni C. Johnson of the Petition for Supervised Administration and Removal of Trustee, converted into a Motion for Summary Judgment by the filing of Affidavits, shall be granted and the Petition for Supervised Administration and Court Ordered Distribution will be dismissed as Kareen's claims set forth in her Petition do not survive John's death under common law, state law or the Trust.

Dated this 21 day of June, 2013.

  
Randall W Robinson, Magistrate

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Memorandum Opinion Re: Kareen Cornell was mailed postage pre-paid, on the 21<sup>st</sup> day of June, 2013, to:

Samuel Creason  
Creason, Moore, Dokken & Geidl  
PO. Drawer 835  
Lewiston, ID 83501

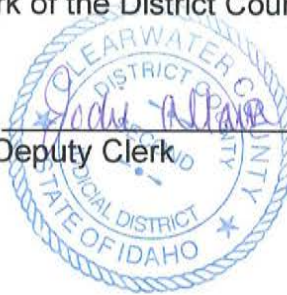
Darrell Aherin  
Aherin, Rice, & Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower, & Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: \_\_\_\_\_

Deputy Clerk





IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

JUDGMENT FOR DISMISSAL

Based upon Findings of Fact and Conclusions of Law as set forth in the Memorandum Opinion Re: Kareen Cornell filed in this case on June 21, 2013, and good cause appearing thereby, IT IS HEREBY ORDERED

That, there being no genuine issue of material fact, the Motion to Dismiss filed by Toni C. Johnson of the Petition for Supervised Administration and Court Ordered Distribution filed by Kareen Cornell, converted into a Motion for Summary Judgment by the filing of Affidavits, IS HEREBY GRANTED and the Petition for Supervised Administration and Court Ordered Distribution is HEREBY DISMISSED.

Dated this 21 day of June, 2013.

Randall W Robinson, Magistrate




## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Judgment of Dismissal was mailed postage pre-paid, on the 21<sup>st</sup> day of June, 2013, to:

Samuel Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower, & Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By:   
Deputy Clerk



7/1/2013  
FILED 4:48 pm AT  
BY [signature] OROFINO, IDAHO

AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for Margaret Watkins

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

APPELLANT REPLY BRIEF

COMES NOW Darrel W. Aherin of Aherin, Rice & Anegon, on behalf of Margaret Watkins, and provides Appellant's Reply Brief to Brief in Opposition to Appeal of Toni C. Johnson and the Brief of Estate of John H. Cornell Re: Appeal of Margaret Watkins.

PROCEDURAL HISTORY

On November 15, 2012 Margaret Watkins was appointed Temporary Personal Representative of the Estate of John Henry Cornell in Clearwater County Case No. CV 2012-439. Toni C. Johnson filed a Motion to Dismiss John Cornell's Petition for Supervised Administration and Removal of Trustee claiming John Cornell's right to one-half of the Trust did not survive his death. To protect the rights and interests of John Cornell, Margaret Watkins, the aunt of John Cornell and Toni Johnson, protected John Cornell's rights. Since the Court considered the issue during the time Margaret Watkins was the Temporary Personal

Representative, she has continued to protect John Cornell's rights that occurred during the time she was the Temporary Personal Representative.

Toni C. Johnson's Motion to Dismiss was made on the argument that John Cornell's right to one-half of the Trust, as set forth in the written Trust, sounded in tort and, therefore, died when he died.

Toni C. Johnson has added another argument to try to deprive her brother, John Cornell, of his one-half of the Trust. Toni Johnson says Margaret Watkins is no longer the Temporary Personal Representative so she should not be able to proceed. Clearly, Toni Johnson will use any procedural or other argument she can to accomplish her goal of refusing to do what was required of her as trustee so she individually can obtain her brother's one-half interest in the Trust.

#### LEGAL ARGUMENT

This case is very straightforward. The Trust created by Michael C. Cornell and Arlie M. Cornell, parents of Toni Johnson and John Cornell, has been intentionally breached by one beneficiary, Toni C. Johnson, so the other beneficiary gets nothing. The beneficiary/trustee who has intentionally breached the Trust now says she gets the entire Trust because a personal injury tort claim dies when the beneficiary dies. In Toni C. Johnson's Brief in Opposition to Appeal, the trustee wants this Court to not allow John Cornell to have the right to appeal. Margaret Watkins, as Temporary Personal Representative, was the person who has put forward John Cornell's claim that he was entitled to one-half of the Trust created by his parents, which he was to receive when his parents died. Margaret Watkins protected John Cornell's rights and continues to preserve John Cornell's right to one-half of the Trust. The Court proceedings in this Trust case started when John Cornell was alive. Toni Johnson, within less than 30 days after her brother's death, filed a Motion to Dismiss his claim for one-half of the Trust he was entitled to. Margaret Watkins protected John Cornell's right to one-half of the Trust by contesting Toni C. Johnson's Motion to Dismiss. Margaret Watkins continues to protect John Cornell's rights to one-half of the Trust.

Toni C. Johnson has clearly not followed the Trust requirements to distribute one-half of the Trust to her brother. John Cornell's request in this case was to receive his property created by the Trust. This case is not a tort action. John Cornell was not seeking tort damages. He sought his property he was entitled to pursuant to a Trust created by his parents. A breach of the

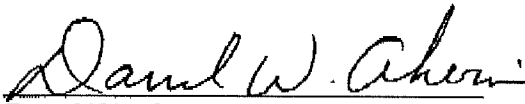
duty to distribute property pursuant to a written document is now being claimed by the breaching party to be a tort claim and the property of John Cornell should go to the person who breached the Trust.

### CONCLUSION

To allow a person to obtain property by intentionally not transferring the property as soon as possible as required by a written document means the law must 100 percent ignore the requirements in the written document and substitute a theory that wrongdoing will be allowed to benefit the wrongdoer.

DATED this 1<sup>st</sup> day of July, 2013.

AHERIN, RICE & ANEGON

By   
Darrel W. Aherin  
Attorney for Appellant

### CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 1<sup>st</sup> day of July, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
P.O. Box 854  
Lewiston, ID 83501

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile 746-9553  
☐ Federal Express

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile 746-2231  
☐ Federal Express

  
DARREL W. AHERIN

Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell

Case No. W2012-277  
Filed 7/2/13  
at 1:52 o'clock P M ✓  
Bernie Bird  
By BP Clerk  
Deputy

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

)  
) Case No. CV 2012-00277  
)  
)

) **NOTICE OF APPEAL**  
)  
)

) **I.R.C.P. 83**  
) **Category L(2)**  
) **Fee: \$61**  
)  
)

TO: TONI C. JOHNSON, AND HER ATTORNEY, KARIN SEUBERT, JONES, BROWER, &  
CALLERY, P.L.L.C., 1304 IDAHO STREET, P.O. BOX 854, LEWISTON, ID 83501  
EMAIL: [KRSEUBERT@LEWISTON.COM](mailto:KRSEUBERT@LEWISTON.COM)

AND

THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The Estate of John Henry Cornell, acting through its personal representative, Kareen Cornell, (hereinafter the "Estate") files this appeal from the Magistrate Court in and for the County of Clearwater.

2. The Estate appeals to the District Court in and for the County of Clearwater.
3. The Estate appeals the Magistrate Court's dismissal of the Estate's Petition for Supervised Administration and Court Ordered Distribution. The Court's dismissal is set forth in its June 21, 2013 JUDGMENT FOR DISMISSAL and MEMORANDUM OPINION RE: KAREEN CORNELL upon which the judgment was based.
4. The appeal is taken upon matters of both law and fact.
5. The proceedings of the hearings were recorded or reported by the method of electronic recordings and are in the possession of the Clearwater County Clerk located in Orofino, Idaho. No records of the proceedings are being requested.
6. The statement of issues on appeal that the Estate intends to assert are as follows:
  - Issue 1.** Whether the Court erred in finding that in the absence of any distribution prior to John Cornell's death, the entirety of the Trust res should be distributed to Toni Johnson.
  - Issue 2.** Whether the Court erred in finding that all of the Estate's claims were based upon wrongs committed by Toni C. Johnson against John Henry Cornell, personally.
  - Issue 3.** Whether the Court erred in finding that claims for breach of a trustee's fiduciary duty abate upon death.
  - Issue 4.** Whether the Court erred in finding that tort claims alleging injury to property abate upon death.
  - Issue 5.** Whether the Court erred in finding that the doctrine of constructive trust was inapplicable.
  - Issue 6.** Whether the Court erred in finding that the Estate's conversion claims abated upon death.
  - Issue 7.** Whether the Court erred in finding that the Estate's unjust enrichment claims abated upon death.

**Issue 8.** Whether the Court erred in finding that claims in equity could be re-characterized as claims at law, which abate upon death.

**Issue 9.** Whether the Court erred in finding that claims for breach of contract could be re-characterized as tort claims, which abate upon death.

**Issue 10.** Whether the Court erred in interpreting Idaho Code § 5-327 in such a manner that claims for injury to property abate unless the injury results in medical expenses, out of pocket expense or lost wages.

7. The above list of issues is not exhaustive and the Estate may assert other issues on appeal thereafter discovered by the Estate.

DATED this 1<sup>st</sup> day of July, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC



Samuel T. Creason, ISB #8183  
Attorney for Personal Representative  
Of Estate of John Henry Cornell



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1st day of July, 2013, I caused a copy of the foregoing NOTICE OF APPEAL to be served by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501  
Fax: 208-746-9553

\_\_\_\_ FIRST-CLASS MAIL  
  K   HAND DELIVERED *via Valley Messenger*  
\_\_\_\_ OVERNIGHT MAIL  
\_\_\_\_ FAX TRANSMISSION

  
\_\_\_\_  
Samuel T. Creason, ISB #8183



Case No. CV2012-277

Filed 7/3/13

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY  
TRUST OF MICHAEL S.  
CORNELL AND ARLIE M.  
CORNELL.

CASE NO. CV2012-277

CLERK'S TRANSMITTAL OF COURT  
FILE AND CERTIFICATE OF APPEAL  
TO DISTRICT COURT

Clerk

Deputy

TO: The District Court of the Second Judicial District, in and for the County of Clearwater.

Transmitted is the case file in the above captioned case.

**APPEAL FROM:** Magistrate Division

**ORDER OR JUDGMENT APPEALED FROM:** Judgment For Dismissal and  
Memorandum Opinion RE:  
Kareen Cornell dated June 21,  
2013

**APPEALED BY:** Personal Representative

**NOTICE OF APPEAL FILED:** July 2, 2013

**APPEAL FEE PAID:** Yes

**ATTORNEY FOR APPELLANT:** Theodore O. Creason

**ATTORNEY FOR RESPONDENT:** Karin Seubert

**OTHER ATTORNEYS:** None

DATED this 3<sup>rd</sup> day of July, 2013.

CARRIE BIRD  
Clerk of the District Court

By: Bali Bird  
Deputy Clerk

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Clerk's Transmittal of Court File and Certificate of Appeal to District Court was hand-delivered, faxed or mailed, postage pre-paid, on the 30 day of July, 2013, to:

Theodore O. Creason,  
Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By

Beth Dyer

Deputy Clerk



Karin Seubert  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )

Case No. CV 2012-00277

**AFFIDAVIT IN SUPPORT OF  
MEMORANDUM OF COSTS AND  
ATTORNEY FEES**

STATE OF IDAHO )

: ss

County of Nez Perce )

KARIN SEUBERT, being first duly sworn, deposes and says:

That I am an attorney duly admitted to practice law before the Courts of the State of Idaho. The firm of Jones, Brower and Callery has been retained by Toni Johnson to defend against the *Petition by Kareen Cornell as Personal Representative of the Estate of John Henry Cornell and as Surviving Spouse of John Henry Cornell, deceased beneficiary of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell for Supervised Administration and Court Ordered Distribution* filed on February 26, 2013. I am well informed as to the costs, disbursements and attorney fees of Toni Johnson in defending against said Petition; that to the best of my knowledge and belief, the items in Exhibits A and B to this Affidavit are correct and

AFFIDAVIT IN SUPPORT OF  
MEMORANDUM OF COSTS  
AND ATTORNEY FEES

that the said disbursements have been necessarily incurred in this action and are being claimed in compliance with Rule 54(d) and 54(e)(3) of the Idaho Rules of Civil Procedure. I make this Affidavit on behalf of Toni Johnson and in support of the Memorandum of Costs and Attorney Fees and, in particular, in support of a request for costs in the sum of \$277.15 and for attorney's fees in the sum of \$7,875.00, for a total of Eight Thousand One Hundred Fifty Two and 15/100 Dollars (\$8,152.15).

To date either I have performed the following professional services in connection with said *Petition by Kareen Cornell as Personal Representative of the Estate of John Henry Cornell and as Surviving Spouse of John Henry Cornell, deceased beneficiary of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell for Supervised Administration and Court Ordered Distribution*:

See Exhibit A attached hereto and made a part hereof.

That the attorney time of the office for Karin Seubert was charged at the rate of \$150.00 per hour. Said rate is within the rates prevailing in the Second Judicial District for the State of Idaho.

In my opinion, based upon the appropriate factors to be considered by the Court, confirmation of \$7,875.00 to Toni Johnson for attorney fees necessarily expended in the good faith defense of this action is reasonable. Specifically, Toni Johnson is the prevailing party as a full dismissal of the opposing party's claims was obtained. Defense of this action involved matters of law that were novel and required extensive time, research and consideration in order to adequately represent the interests of Toni Johnson. Further, the time limitations imposed by the circumstances of the case required extraordinary attention by the undersigned attorney, including that required by the pending appeal, which are not reflected in the attorney fee amount sought herein. Further, the circumstances of the case are such make it undesirable.



Said figure specifically excludes amounts incurred for the probate of the estate of John Henry Cornell, deceased, or in defending against the appeal being pursued by Margaret Watkins, or in defending against the Petition filed by John Cornell during his lifetime.

Additionally, to date, this firm has advanced the following costs for a filing fee in connection with the defense of said *Petition by Kareen Cornell as Personal Representative of the Estate of John Henry Cornell and as Surviving Spouse of John Henry Cornell, deceased beneficiary of the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell for Supervised Administration and Court Ordered Distribution*:

See Exhibit B attached hereto and made a part hereof.

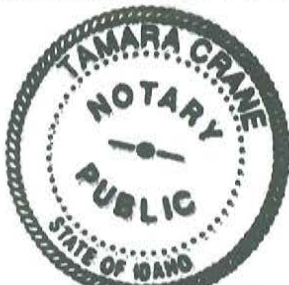
In my opinion, based on the appropriate factors to be considered by the Court, an award of Two Hundred Seventy Seven and 15/100 (\$217.50) to Toni Johnson for costs necessarily expended in the good faith defense of this action is reasonable. Said cost was incurred for one copy of the deposition of Toni Johnson and is allowed as a matter of right pursuant to I.R.C.P. 54(d)(1)(C)(10).

DATED this 2nd day of July, 2013.

**JONES, BROWER & CALLERY, P.L.L.C.**

By Karin Seubert  
KARIN SEUBERT

SUBSCRIBED AND SWORN to before me this 2nd day of July, 2013.



Tamara Crane  
Notary Public in and for the State of Idaho  
Residing at Lewiston, Idaho.  
My commission expires 03/06/14.

AFFIDAVIT IN SUPPORT OF  
MEMORANDUM OF COSTS  
AND ATTORNEY FEES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *AFFIDAVIT IN SUPPORT OF MEMORANDUM OF COSTS AND ATTORNEY FEES* was, this 2nd day of July, 2013, hand-delivered by providing a copy to Valley Messenger Service addressed to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By



KARIN SEUBERT

**EXHIBIT A: Attorney Fees**

<u>Date</u>	<u>Service Provided</u>	<u>Time</u>	<u>Fee</u>
2/26/2013	Hearing on motion for consolidation.	1.00	\$150.00
2/28/2013	Telephone conference with client.	0.50	\$75.00
2/28/2013	Motion for protective order and related documents and correspondence; research.	2.00	\$300.00
3/1/2013	Motion to dismiss.	1.00	\$150.00
3/12/2013	Telephone conference with Creason.	0.50	\$75.00
3/13/2013	Telephone conference with Court.	0.25	\$37.50
3/13/2013	Hearing preparation; participated in hearing on Motion for protective order (telephonic).	1.50	\$225.00
3/20/2013	Telephone conference to client. Confirming letter.	1.00	\$150.00
3/27/2013	Telephone conference with client.	0.25	\$37.50
4/2/2013	Conference with client re: discovery response.	5.00	\$750.00
4/8/2013	Prepared draft discovery response.	1.00	\$150.00
4/9/2013	Prepared inventory, accounting; further work on discovery response.	2.00	\$300.00
4/10/2013	Further work on inventory, accounting, discovery response.	6.00	\$900.00
4/11/2013	Conference with client to review draft discovery response, inventory, accounting.	0.50	\$75.00
4/15/2013	Conference with Creason. Finalized discovery response.	No charge	
4/22/2013	Deposition of Toni Johnson.	4.00	\$600.00
4/23/2013	Telephone conference with client.	No charge	
5/6/2013	Memo. in support of motion to dismiss; research.	4.00	\$600.00
5/7/2013	Memo. in support of motion to dismiss; research.	3.00	\$450.00
5/15/2013	Reviewed Estate's motion to stay proceeding and related filings; research.	1.00	\$150.00
5/15/2013	Telephone conference with Creason.	0.25	\$37.50
5/16/2013	Research; objection for motion for stay.	2.00	\$300.00
5/17/2013	Participated in hearing on motion for stay.	1.50	\$225.00
5/20/2013	Conference with Creason.	0.50	\$75.00
5/22/2013	Reviewed response brief; research.	1.00	\$150.00
5/24/2013	Research; reply brief.	4.00	\$600.00
5/28/2013	Reply brief.	3.00	\$450.00
5/29/2013	Telephone conference with client.	0.25	\$37.50
6/4/2013	Hearing preparation; travel to/from Orofino; attended hearing on motion to dismiss.	4.00	\$600.00
6/25/2013	Reviewed memorandum opinion; letter to client.	0.50	\$75.00
7/2/2013	Prepared memorandum of costs and attorney fees and related documents.	1.00	\$150.00
TOTAL			\$7,875.00

AFFIDAVIT IN SUPPORT OF MEMORANDUM OF  
COSTS AND ATTORNEY FEES

**EXHIBIT B: Costs**

<u>Cost Incurred</u>	<u>Amount</u>
One copy of deposition of Toni Johnson	\$277.15



Karin Seubert  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1304 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:	)	
	)	Case No. CV 2012-00277
THE REVOCABLE FAMILY TRUST OF	)	
MICHAEL S. CORNELL AND ARLIE M.	)	<b>MEMORANDUM OF COSTS AND</b>
CORNELL.	)	<b>ATTORNEY FEES</b>

COMES NOW Karin Seubert of Jones, Brower and Callery, P.L.L.C., on behalf of the Respondent Toni Johnson, pursuant to Idaho Code Section 15-8-208 and Rule 54(d), 54(e)(1) and 54(e)(3) of the Idaho Rules of Civil Procedure, submit the following items of costs to which the Court may order to be awarded to Respondent Toni Johnson and against the Estate of John H. Cornell, deceased, as follows:

Costs (deposition copy, I.R.C.P. 54(d)(1)(C)(10))	\$277.15
Reasonable attorney fees to be fixed by the Court as set out in the Affidavit for Attorney Fees filed herewith (specifically does not include costs related to probate of Estate of John Cornell or appeal being pursued by Margaret Watkins).	\$7,875.00

DATED this 2nd day of July, 2013.

**JONES, BROWER & CALLERY, P.L.L.C.**

By Karin Seubert  
KARIN SEUBERT

KARIN SEUBERT being first duly sworn and on oath, deposes and says:

That she is the attorney for Respondent Toni Johnson and as such is well informed as to the costs, disbursements and attorney fees of Toni Johnson; that to the best of her knowledge and belief, the items in the Memorandum of Costs and Attorney Fees are correct and that the said disbursements have been necessarily incurred in said action and are being claimed in compliance with Rule 54(d) and 54(e)(3) of the Idaho Rules of Civil Procedure.

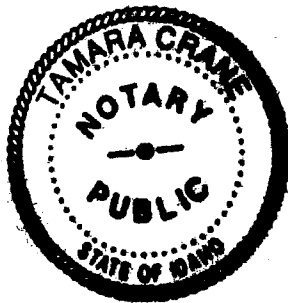
DATED this 2nd day of July, 2013.

Karin Seubert  
KARIN SEUBERT

STATE OF IDAHO,                    )  
  : ss.  
COUNTY OF NEZ PERCE.    )

SUBSCRIBED and SWORN to before me this 2nd day of July, 2013.

(SEAL)



Tamara Crane  
NOTARY PUBLIC for State of Idaho  
Residing at Lewiston  
My Commission Expires: 03/06/14

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MEMORANDUM OF COSTS AND ATTORNEY FEES* was, this 2nd day of July, 2013.

☒ hand-delivered by providing a  
\_\_\_\_\_ copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
\_\_\_\_\_ mailed, postage pre-paid,  
\_\_\_\_\_ by first class mail; or  
\_\_\_\_\_ transmitted via facsimile  
\_\_\_\_\_ transmitted via e-mail

to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By

  
KARIN SEUBERT



Theodore O. Creason, ISB #1563  
 Samuel T. Creason ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Personal Representative  
 Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

) Case No. CV 2012-00277

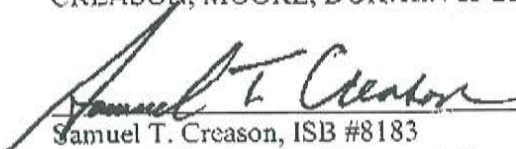
THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

) **MOTION TO DISALLOW COSTS AND  
 ATTORNEY FEES (I.R.C.P. 54(d)(6))**

COMES NOW Karen Cornell, Personal Representative of the Estate of John Henry Cornell, by and through her attorney of record, Samuel T. Creason of Creason, Moore, Dokken & Geidl, PLLC, and hereby moves this Court to disallow all or part of the costs and attorney fees set forth in Toni Johnson's Memorandum of Costs and Attorney Fees. Movant basis this motion upon the authorities and arguments set forth in the Memorandum in Support filed herewith.

DATED this 9th day of July, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
 Samuel T. Creason, ISB #8183

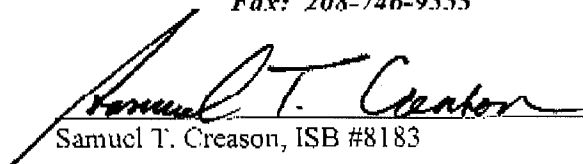
Attorneys for Personal Representative

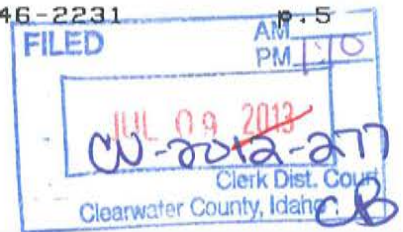
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9th day of July, 2013, I filed the foregoing **MOTION TO DISALLOW COSTS AND ATTORNEY FEES (I.R.C.P. 54(d)(6))** with the Clerk of the Court (via facsimile to (208) 476-9315), and also **delivered a copy via facsimile** to the following persons at the fax numbers designated below:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501  
**Fax: 208-746-3650**

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501  
**Fax: 208-746-9553**

  
\_\_\_\_\_  
Samuel T. Creason, ISB #8183



Theodore O. Creason, ISB #1563  
 Samuel T. Creason ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Personal Representative  
 Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

)  
 ) Case No. CV 2012-00277  
 )  
 ) **MEMORANDUM IN SUPPORT**  
 )  
 ) **RE: MOTION TO DISALLOW**  
 ) **COSTS AND ATTORNEY FEES**  
 ) **(I.R.C.P. 54(d)(6))**  
 )

Kareen Cornell, Personal Representative of the Estate of John Henry Cornell (hereinafter, "Estate") objects to Johnson's memorandum of costs and attorney fees on the grounds that the fees should not be awarded. Toni Johnson brings her claim for attorney fees pursuant to Idaho Code § 15-8-208. Section 15-8-208 provides that the court "may, in its discretion, order costs, including reasonable attorney's fees . . . ." The Court should disallow Johnson's motion for fees because an award be inequitable given that Johnson has admitted that she engaged in the breaches of fiduciary duty alleged in the Estate's Petition.

**MEMORANDUM IN SUPPORT RE: MOTION TO  
 DISALLOW COSTS AND ATTORNEY FEES  
 (I.R.C.P. 54(d)(6)) - 1**

Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston, ID 83501  
 (208) 743-1516; Fax: (208) 746-2231

### ANALYSIS

Johnson raises Idaho Code § 15-8-208 as the statutory grounds upon which she claims attorney fees. Section 15-8-208 places determinations regarding an award of fees within the sound discretion of the district court. “That section allows courts to award fees in cases governed by the Trust and Estate Dispute Resolution Act when doing so would be equitable.” *Banner Life Ins. Co. v. Mark Wallace Dixon Irrevocable Trust*, 147 Idaho 117, 133, 206 P.3d 481, 497 (2009). Because an award in favor of Ms. Johnson would be inequitable, this Court should deny her motion.

The Estate’s Petition raised several causes of action based upon alleged facts that Johnson damaged the Trust res and John Cornell by her inequitable behavior. One of the damages suffered by John Cornell was that Johnson’s conduct essentially deprived him of the inheritance his parents intended to provide him. Johnson did not dispute that she engaged in this behavior. In fact, Johnson’s counsel conceded—and the Court found—that Johnson had engaged in many of the breaches alleged in the Estate’s Petition. Rather, Johnson prevailed on the issue of abatement of those causes of action upon the demise of John Cornell. Awarding attorney fees against the Estate of John Cornell to a person who admittedly engaged in the conduct giving rise to the pled causes of action—and injuring John Cornell—would be inequitable.

Further, the grounds upon which judgment was granted are not so clear that the Petition could be characterized as inappropriately filed. This Court has noted at oral argument that the issues upon which judgment was granted are in an unsettled area of Idaho law. This Court also stated that the issues may need to be raised all the way to the Idaho Supreme Court before any

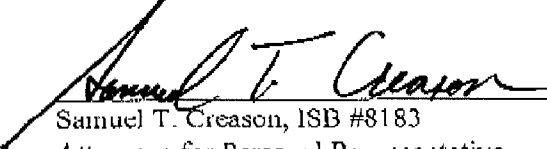
clear resolution in this matter. Judgment on such an unsettled area of law, where the wrongdoing has been conceded, does not support an award of attorney fees against the successor in interest to the injured party.

**CONCLUSION**

Johnson asks this Court to order a discretionary award of fees pursuant to Idaho Code § 15-8-208. The Court should decline to grant Johnson's request because doing so would not be equitable.

DATED this 9th day of July, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
\_\_\_\_\_  
Samuel T. Creason, ISB #8183  
Attorneys for Personal Representative



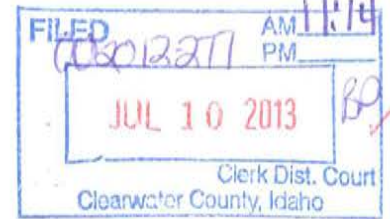
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 9th day of July, 2013, I filed the foregoing **MEMORANDUM IN SUPPORT RE: MOTION TO DISALLOW COSTS AND ATTORNEY FEES (I.R.C.P. 54(d)(6))** with the Clerk of the Court (via facsimile to (208) 476-9315), and also **delivered a copy via facsimile** to the following persons at the fax numbers designated below:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501  
*Fax: 208-746-3650*

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501  
*Fax: 208-746-9553*

  
\_\_\_\_\_  
Samuel T. Creason, ISB #8183



AHERIN, RICE & ANEGON

Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for Margaret Watkins

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

MOTION TO MEDIATE

COMES NOW Darrel W. Aherin of Aherin, Rice & Anegon, on behalf of Margaret Watkins, and hereby requests that the Court set the above case for mediation. This motion is made pursuant to I.R.C.P. 16(k)(A). Mediation was suggested by Judge Randall Robinson as a means of reaching a resolution in this case and *In the Matter of the Estate of John Henry Cornell*, Clearwater County Case No. CV 2012-439.

The undersigned requests that the Honorable Jay Gaskill be appointed as mediator and a mediation be conducted in Lewiston, Idaho.

If the matters are set for mediation, the undersigned, on behalf of Margaret Watkins, will agree to stay the current appeal in this matter pending the outcome of the mediation.

Oral argument is requested.

DATED this 9<sup>th</sup> day of July, 2013.

AHERIN, RICE & ANEGON

By: Darrel W. Aherin  
Darrel W. Aherin  
Attorney for Margaret Watkins

CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 9<sup>th</sup> day of July, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

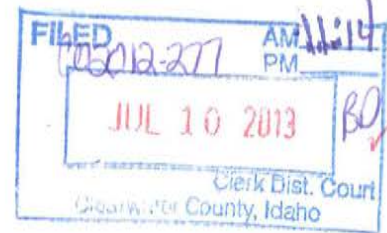
Karin Seubert  
Jones, Brower, & Callery, PLLC.  
P.O. Box 854  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile 746-9553
- ☐ Federal Express

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

- ☐ U.S. Mail
- ☐ Hand Delivery
- ☒ Facsimile 746-2231
- ☐ Federal Express

Darrel W. Aherin  
DARREL W. AHERIN



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorneys for Margaret Watkins

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

NOTICE OF TELEPHONIC HEARING

TO: TONI C. JOHNSON:

YOU WILL PLEASE TAKE NOTE that on Tuesday, July 30, 2013, at the hour of 1:45 p.m. (Pacific), or as soon thereafter as counsel may be heard, at the courtroom of the above entitled court, in Orofino, County of Clearwater, Idaho, the court will call on for telephonic hearing the Motion to Mediate filed herewith.

DATED this 9<sup>th</sup> day of July, 2013.

AHERIN, RICE & ANEGON

By Darrel W. Aherin  
Darrel W. Aherin  
Attorney for Margaret Watkins

FILED 7/12/2013 AT 10:25 am OROFINO, IDAHO  
BY cf

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:	)	CASE NO. CV2012-277
	)	
THE REVOCABLE FAMILY TRUST OF	)	
MICHAEL S. CORNELL AND ARLIE M.	)	ORDER FOR TRANSCRIPT
CORNELL,	)	ON APPEAL
	)	

WHEREAS, a Notice of Appeal to the District Court has been filed in the above matter and the Court being fully advised;

IT IS HEREBY DETERMINED AND ORDERED AS FOLLOWS:

1. Said appeal involves both questions of fact and questions of law;
2. A transcript of the Motion Hearing held June 4, 2013 before the Magistrate's Division is required for the processing of the appeal; The appellant shall pay the District Court the estimate transcript fees of \$200.00 within fourteen (14) days of the date of this order in accordance with I.R.C.P. 83 (k); and there will be no extensions granted. Failure to pay will result in a dismissal of this matter.
3. Upon payment of the estimated transcript fees, the transcriber shall prepare a transcript as proved in Rule 83(k).

DATED this 12 day of July, 2013.

  
\_\_\_\_\_  
Michael J. Griffin  
District Judge

ORDER FOR TRANSCRIPT ON APPEAL - 1



CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing ORDER FOR TRANSCRIPT ON APPEAL was mailed, postage prepaid this 12<sup>th</sup> day of July, 2013, to the following:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C  
P.O. Box 854  
Lewiston, Idaho 83501

Darrel W. Aherin  
Aherin, Rice and Anegon  
P.O. Drawer 698  
Lewiston, Idaho 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, Idaho 83501



CARRIE BIRD, Clerk of Court

By: \_\_\_\_\_

Deputy

*C. Hering*

ORDER FOR TRANSCRIPT ON APPEAL - 2



AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for Margaret Watkins

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

MOTION TO DISALLOW COSTS AND  
ATTORNEY FEES CLAIMED BY TONI C.  
JOHNSON AGAINST THE TRUST

COMES NOW Darrel W. Aherin of Aherin, Rice & Anegon, on behalf of Margaret Watkins and moves the Court pursuant to I.R.C.P. 54(d)(6) for an order disallowing the costs and attorney fees sought in the Memorandum of Costs and Attorney Fees dated July 2, 2013, filed by Toni C. Johnson and Affidavit in Support of Memorandum of Costs and Attorney Fees.

Under the terms of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell, dated November 1, 1996, hereinafter "The Trust," Michael S. Cornell and Arlie M. Cornell, or the survivor between them, were Co-Trustees. The Trust further provided that upon the death or incapacity of the last survivor of the initial trustees, Toni C. Johnson and John H. Cornell would act as successor trustees. This could not be modified after Arlie M. Cornell died.

After the death of Arlie M. Cornell, Michael S. Cornell illegally modified The Trust to appoint Toni C. Johnson as sole successor trustee upon his death or incapacity, and John H.

MOTION TO DISALLOW COSTS AND  
ATTORNEY FEES CLAIMED BY TONI C.  
JOHNSON AGAINST THE TRUST -- 1

**Aherin, Rice & Anegon**  
Attorneys at Law  
Lewiston, Idaho

N:\Cornell, John\Pleadings\Motion to Disallow Costs and Attorney Fees.docx ser

Cornell as trustee in the event Toni C. Johnson could not act. Section 1.06 of The Trust provides that amendments to The Trust could be made “during the *joint* lives of the Trustors” (emphasis added).

Toni C. Johnson has been serving as sole successor trustee since the death of Michael S. Cornell on December 15, 2009 in violation of the trust.

No inventory of the assets in The Trust at the time of the death of Michael S. Cornell has been provided by Toni Johnson.

The Trust, Section 4.03 provides as follows:

On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: TONI C. JOHNSON AND JOHN H. CORNELL.

Toni C. Johnson is asking this court to continue rewarding her for intentionally breaching the trust because the trust terminated on December 15, 2009. Toni C. Johnson should pay the attorney fees personally because had she distributed the assets timely, the claimed attorney fees and costs would not have been incurred.

The main asset of The Trust is the house and real property. Toni C. Johnson has been residing in the house since Michael S. Cornell’s death on December 15, 2009. The property remains in the name of The Trust and was not distributed to the two beneficiaries “*as soon as reasonably possible*”. Toni C. Johnson has paid no rent during her tenancy of the premises.

Toni C. Johnson has mismanaged the Trust in that she has used a substantial amount of the monies available to pay both expenses of maintaining the real property, where she has resided for three years and to pay her personal expenses. No money was distributed to John Henry Cornell.

Toni C. Johnson has breached her fiduciary duty to settle and distribute the Trust in accordance with the terms of the Trust. The actions and mismanagement of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell by Toni C. Johnson are the sole cause of this action.

The Trust should not be responsible for Toni C. Johnson’s attorney fees or costs.

Oral argument is requested.

MOTION TO DISALLOW COSTS AND  
ATTORNEY FEES CLAIMED BY TONI C.  
JOHNSON AGAINST THE TRUST -- 2

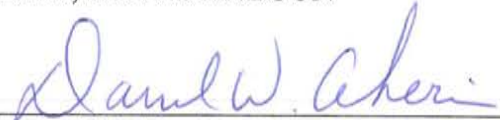
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**Aherin, Rice & Anegon**  
Attorneys at Law  
Lewiston, Idaho



DATED this 12<sup>th</sup> day of July, 2013.

AHERIN, RICE & ANEGON

By   
Darrel W. Aherin

CERTIFICATE OF SERVICE

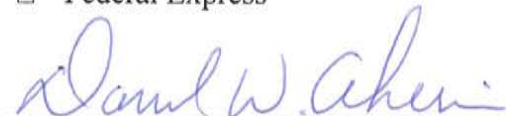
I, DARREL W. AHERIN, hereby certify that on the 12<sup>th</sup> day of July, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
P.O. Box 854  
Lewiston, ID 83501

- ☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile 746-9553  
☐ Federal Express

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

- ☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile 746-2231  
☐ Federal Express

  
DARREL W. AHERIN

MOTION TO DISALLOW COSTS AND  
ATTORNEY FEES CLAIMED BY TONI C.  
JOHNSON AGAINST THE TRUST -- 3

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**Aherin, Rice & Anegon**  
Attorneys at Law  
Lewiston, Idaho

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
OROFINO, IDAHO 83544



In The Matter Of

Michael S. Cornell, etal.

Case No: CV-2012-0000277

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Motion

Judge:

Courtroom:

Tuesday, September 03, 2013

Randall W. Robinson

Magistrate Courtroom

10:00 AM

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on July 25th, 2013.

KARIN SEUBERT  
P.O. BOX 854  
LEWISTON ID 83501

☒ Mailed ☐ Hand Delivered ☐ Faxed

THEODORE O. CREASON  
P.O. DRAWER 835  
LEWISTON ID 83501

☒ Mailed ☐ Hand Delivered ☐ Faxed

DARREL W. AHERIN  
P.O. BOX 698 1212 IDAHO ST.  
LEWISTON ID 83501-0698

☒ Mailed ☐ Hand Delivered ☐ Faxed

Dated: July 25th, 2013  
Carrie Bird  
Clerk Of The District Court

By: Bolivi Dey  
Deputy Clerk

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF )  
MICHAEL S. CORNELL, et al, )  
)  
)  
)  
)  
)  
)

CASE NO. CV2012-277

COURT MINUTES

Michael J. Griffin, District Judge Presiding  
Darrel Aherin, Attorney  
Karin Seubert, Attorney  
Theodore Creason, Attorney  
Christy L. Gering, Deputy Court Clerk  
Date: 07/30/2013 Tape: CD577-1 Time: 1:50 p.m.  
Subject of Proceeding: Telephonic Motion Hearing

=====

MINUTE ENTRY:

- 1:50 Honorable Michael J. Griffin presiding. Court gives introductions. Parties present by phone: Darrel Aherin, Attorney; Karin Seubert, Attorney; Theodore Creason, Attorney. Court advises this is the time set for a motion hearing. Court inquires of counsel their thoughts as to mediation.
- 1:51 Mr. Creason speaks and does not feel mediation would be beneficial with Ms. Watkins.
- 1:52 Ms. Seubert is not opposed to mediation but does not feel it would be productive to mediate with Ms. Watkins.
- 1:52 Mr. Aherin speaks and argues his motion to mediate.
- 1:55 Colloquy with Court and counsel regarding
- 2:00 Court speaks and inquires of counsel regarding mediation as to Ms. Watkins.
- 2:00 Ms. Seubert speaks and does not see Ms. Watkins interest to this case.

Christy Gering  
Deputy Clerk

Court Minutes - 1

IN THE MATTER OF MICHAEL S. CORNELL  
CASE NO. CV2012-277

2:01 Mr. Aherin speaks.

2:03 Court inquires if Mr. Creason and Ms. Seubert are adamantly opposed or somewhat opposed to the mediation with all three parties at the table.

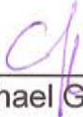
2:04 Mr. Creason responds.

2:04 Ms. Seubert responds.

2:05 Mr. Aherin responds.

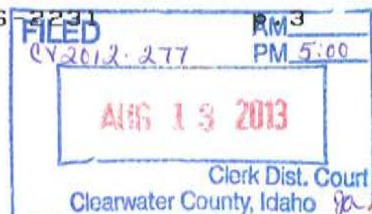
2:07 Court denies the motion for mediation. Court further speaks regarding the appeal and advises once the transcript is prepared, a briefing schedule and will be set.

2:09 Court in recess.

Approved: 

\_\_\_\_\_  
Michael Griffin, District Judge





Theodore O. Creason, ISB #1563  
 Samuel T. Creason ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Personal Representative  
 Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

)  
 ) Case No. CV 2012 00277  
 )

) **NOTICE OF HEARING**  
 )

) **RE: MOTION TO DISALLOW COSTS  
 AND ATTORNEY FEES  
 (I.R.C.P. 54(d)(6))**

Notice is hereby given that the undersigned will call on for hearing Motion to Disallow Costs and Attorney Fees (I.R.C.P. 54(d)(6)) claimed by Toni C. Johnson against the Trust on Tuesday, September 3, 2013, at 10:00 a.m., or as soon thereafter as counsel may be heard in the courtroom at the Clearwater County Courthouse, Orofino, Idaho.

DATED this 13<sup>th</sup> day of August, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
 Theodore O. Creason, ISB # 1563  
 Attorney for Petitioner Karen Cornell

NOTICE OF HEARING - 1

Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston ID 83501  
 (208)743-1516; Fax(208)746-2231

CERTIFICATE OF MAILING


I HEREBY CERTIFY that on this 13<sup>th</sup> day of August, 2013, a copy of the foregoing NOTICE OF HEARING RE: MOTION TO DISALLOW COSTS AND ATTORNEY FEES (I.R.C.P. 54(d)(6)) was served by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, PLLP  
1304 Idaho Street  
P. O. Box 854  
Lewiston, Idaho 83501

\_\_\_ FIRST-CLASS MAIL  
\_\_\_ HAND DELIVERED  
\_\_\_ OVERNIGHT MAIL  
☒ FAX TRANSMISSION  
(208) ~~344-5510~~ 746-9552

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, Idaho 83501

\_\_\_ FIRST-CLASS MAIL  
\_\_\_ HAND DELIVERED  
\_\_\_ OVERNIGHT MAIL  
☒ FAX TRANSMISSION  
(208) ~~344-5510~~  
746-3650

  
Theodore O. Creason, ISB # 1563

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER

Case No. CV 2012-277  
Filed 9/3/2013  
at 10:30 o'clock A M  
Carrie Bird  
Case No: CV-2012-0000277  
By [Signature] Clerk  
Deputy

IN THE MATTER OF )

MICHAEL S. CORNELL, ETAL. )

Case No: CV-2012-0000277

COURT MINUTES

Presiding Judge: Randall W. Robinson

Court Clerk:

Tuesday, September 03, 2013 at 10:00 AM

Tape/Disk CD 474-2

Plaintiff's Counsel:

Defendant's Counsel:

Court Hearing Type: Motion

FOOTAGE/TIME: 10:10 - 10:22

Honorable Randall W. Robinson presiding. Present in court: Mr Darrel Aherin by telephone

10:10 Samuel Creason, Karin Seubert

Court introduces parties

10:10 Court confirms attorney fees for 15-8-208

10:11 Ms Seubert clarifies attorney fees request for Tedra Action

10:12 Court - leaning against this request, explains

10:13 Ms Seubert - explains request and history of this request  
- only for the 2nd portion of this action,

10:15 Court - explains his reasons

Mr Aherin - agrees with Court

10:17 Mr Creason - agrees with Court

Ms Seubert - argues there are costs, such as \$277.00  
Disposition fee

10:18 Mr Creason Rule 54 - argues

Colloquy between Court, Ms Seubert, Mr Creason re fee

- Rule 54 D

- ID 145 -

memo (7/2/2013) of fees - clarifies the correct  
memo of fees

10:21 Mr Creason - \ colling re: fees  
Ms Seubert /  
COURT, Mr Aherin

10:22 COURT - Deny Attorney fees  
- will issue a Decision by end of week  
Re: Disp Fee

10:22 Recess





IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

MEMORANDUM OPINION RE  
ATTORNEY FEES AND COSTS

The issue addressed is whether to grant Toni Johnson attorney fees and costs against the estate of John H. Cornell as requested by the Memorandum of Costs and Attorney Fees filed on July 5, 2013. Darrell Aherin Esq., appearing on behalf of the deceased John H. Cornell, filed an objection and memorandum in opposition to the request as did Samuel Creason, who appeared on behalf of Kareen Cornell, the personal representative of the estate of John H. Cornell. Oral argument was heard on September 4, 2013, Karen Seubert presenting argument on behalf of Ms. Johnson and Mr. Aherin and Mr. Creason presenting argument as well.

On February 15, 2013, this Court dismissed the claims of the deceased John H. Cornell and on June 21, 2013 dismissed the claims of Karen Cornell. As the prevailing party, Ms. Johnson seeks attorney fees and the costs of a deposition pursuant to Idaho Code § 15-8-208. Idaho Code § 15-8-208 provides: "Either the district court or the court on appeal may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party (a) from any party to the proceedings."

Ms. Seubert conceded at oral argument, and I so find, that the arguments made by Mr. Aherin and Mr. Creason were not made frivolously, unreasonably, or without

MEMORANDUM OPINION-1  
RE ATTORNEY FEES AND COSTS

foundation. The arguments that were made were cogent and reasoned and excellent in shedding light on an abstruse area of the law. Therefore, the issue is whether this Court should exercise its discretion to award attorney fees and costs in favor of Toni Johnson against the Estate of John H. Cornell.

The Idaho Supreme Court has observed that Idaho Code § 15-8-208 “allows courts to award fees in cases governed by the Trust and Estate Dispute Resolution Act when doing so would be equitable.” *Banner Life Insurance v. Dixson Irrevocable Trust*, 147 Idaho 117, 133, 206 P.3d 481 (2009). Under the circumstances of this case, it would be inequitable and inappropriate to award attorney fees to Ms. Johnson against the estate of John H. Cornell.

The dismissals were not based upon the merits of the claims made on behalf of the deceased John H. Cornell and his estate, but rather upon the abatement of Mr. Cornell’s claims against Ms. Johnson upon Mr. Cornell’s death. The facts are more fully set forth in the Memorandum Opinions. Ms. Johnson and Mr. Cornell are siblings and were named as recipients of a trust established by their parents.

Following the death of the last surviving parent, Ms. Johnson was required under state law and the terms of the trust to distribute the assets of the trust as expeditiously as possible to herself and Mr. Cornell. In the nearly two (2) years from the last trustor’s death through Mr. Cornell’s death, Ms. Johnson failed to distribute any part of the Trust to Mr. Cornell. Mr. Cornell waited in vain for funds from the trust to pay for necessary medical care that he could not obtain without money from the trust. Mr. Cornell contacted Ms. Johnson and her attorney, a different attorney than her present attorney,

several times for accountings and for word on the status of the trust. He never received a response.

Ms. Johnson used funds from the trust for her personal expenses while Mr. Cornell was making his requests for information regarding distribution of the trust. Ms. Johnson lived rent free in the home that is included in the Trust. Ms. Johnson entirely thwarted the intentions of her parents in establishing the trust for her brother to receive half the estate. Ms. Johnson dishonored the trust her father placed in her when he named her as the sole person responsible for distribution of the trust. Ms. Johnson acted inappropriately in bestowing the proceeds of the trust upon herself and not share one cent with her brother.

Ms. Johnson egregiously wronged her brother during his lifetime. Now she wishes to continue wronging her brother after his death by not only keeping the assets that were intended for Mr. Cornell, but also raiding his estate for her attorney fees. Certainly, this is not the result that the parents of Mr. Cornell and Ms. Johnson intended when they created the trust.

The law of abatement is an unsettled area of law. The issue of abatement only arose after Mr. Cornell filed his action against Ms. Johnson for her mismanagement of the estate. Although the arguments of Mr. Cornell and his estate were rejected, the arguments were soundly based. The inequitable conduct of Ms. Johnson justified the vigorous arguments made on behalf of Mr. Cornell. I, therefore, reject Ms. Johnson's request for attorney fees from the Estate of John H. Cornell.

Ms. Johnson also requests that she be awarded \$277.15 for the costs of obtaining a copy of her deposition. Ms. Johnson asserts she is entitled to the award as

a prevailing party pursuant to Idaho Rule of Civil Procedure 54(d)(1)(C)(10). Rule 54(d)(1) provides, "Except when otherwise limited by these rules, costs shall be allowed as a matter of right of the prevailing party or parties *unless otherwise ordered by the court.*" (emphasis added). Rule 54(d)(1)(C)(10) relied upon by Ms. Johnson provides, "*When costs are awarded to a party*, such party shall be entitled to the following costs, actually paid, as a matter of right: ... (10) Charges for one (1) copy of any deposition taken by any of the parties to the action in preparation for trial of the action." (emphasis added).

The decision whether to grant costs is a matter of discretion. It would be inequitable to award Ms. Johnson her costs for the same reason it is inequitable to award her attorney fees from the Estate of John H. Cornell.

#### CONCLUSION

Toni Johnson's request for an award of attorney fees and the cost of a deposition from the estate of John H. Cornell is denied for the reasons set forth above.

Dated this 6th day of September, 2013.



Randall W Robinson, Magistrate

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Judgment of Dismissal was mailed postage pre-paid, on the 9<sup>th</sup> day of September, 2013, to:

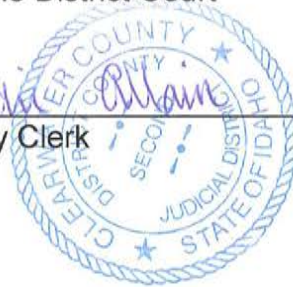
Samuel Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

Darrell Aherin  
Aherin, Rice & Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: Jacqui Allame  
Deputy Clerk





IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

ORDER RE ATTORNEY  
FEES AND COSTS

Based upon Findings of Fact and Conclusions of Law as set forth in the  
Memorandum Opinion Re Attorney Fees and Costs, the Memorandum of Costs and  
Attorney Fees filed on July 5, 2013 is HEREBY DENIED.

Dated this 6th day of September, 2013.

  
Randall W Robinson, Magistrate

ORDER RE ATTORNEY FEES-1  
AND COSTS



## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order Re Attorney Fees and Costs was mailed postage pre-paid, on the 9<sup>th</sup> day of September, 2013, to:

Samuel Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

Darrell Aherin  
Aherin, Rice & Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: Jodie Blount

Deputy Clerk



ORDER RE ATTORNEY FEES-2  
AND COSTS





AHERIN, RICE & ANEGON  
Darrel W. Aherin  
1212 Idaho Street  
P.O. Drawer 698  
Lewiston, ID 83501-0698  
(208) 746-3646  
ISB# 1534

Attorney for Margaret Watkins

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

MOTION TO AUGMENT RECORD

COMES NOW the appellant, Margaret Watkins, by and through her attorney of record, Darrel W. Aherin of Aherin, Rice & Anegon, and moves the Court for an order augmenting the clerk's record to add the following documents:

1. Memorandum Opinion Re Attorney Fees and Costs entered September 6, 2013 (copy attached hereto as Exhibit A); and
2. Order Re Attorney Fees and Costs entered September 6, 2013 (copy attached hereto as Exhibit B).

The specific grounds for this request are that said documents support the appellant's Brief in Support of Appeal and Appellant Reply Brief and are necessary in order to allow the District Court to be fully advised.

MOTION TO AUGMENT RECORD -- 1

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DATED this 12<sup>th</sup> day of September, 2013.

AHERIN, RICE & ANEGON

By: Darrel W. Aherin  
Darrel W. Aherin, Attorney for  
Appellant, Margaret Watkins

CERTIFICATE OF SERVICE

I, DARREL W. AHERIN, hereby certify that on the 12<sup>th</sup> day of September, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC.,  
P.O. Box 854  
Lewiston, ID 83501

- ☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Federal Express

Theodore O. Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

- ☒ U.S. Mail  
☐ Hand Delivery  
☐ Facsimile  
☐ Federal Express

Darrel W. Aherin  
DARREL W. AHERIN

FILED AM  
CV 2012-277 PM 4:30  
SEP 06 2013  
Clerk Dist. Court  
Clearwater County, Idaho

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE  
  
THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277  
  
MEMORANDUM OPINION RE  
ATTORNEY FEES AND COSTS

The issue addressed is whether to grant Toni Johnson attorney fees and costs against the estate of John H. Cornell as requested by the Memorandum of Costs and Attorney Fees filed on July 5, 2013. Darrell Aherin Esq., appearing on behalf of the deceased John H. Cornell, filed an objection and memorandum in opposition to the request as did Samuel Creason, who appeared on behalf of Kareen Cornell, the personal representative of the estate of John H. Cornell. Oral argument was heard on September 4, 2013, Karen Seubert presenting argument on behalf of Ms. Johnson and Mr. Aherin and Mr. Creason presenting argument as well.

On February 15, 2013, this Court dismissed the claims of the deceased John H. Cornell and on June 21, 2013 dismissed the claims of Karen Cornell. As the prevailing party, Ms. Johnson seeks attorney fees and the costs of a deposition pursuant to Idaho Code § 15-8-208. Idaho Code § 15-8-208 provides: "Either the district court or the court on appeal may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party (a) from any party to the proceedings."

Ms. Seubert conceded at oral argument, and I so find, that the arguments made by Mr. Aherin and Mr. Creason were not made frivolously, unreasonably, or without



foundation. The arguments that were made were cogent and reasoned and excellent in shedding light on an abstruse area of the law. Therefore, the issue is whether this Court should exercise its discretion to award attorney fees and costs in favor of Toni Johnson against the Estate of John H. Cornell.

The Idaho Supreme Court has observed that Idaho Code § 15-8-208 "allows courts to award fees in cases governed by the Trust and Estate Dispute Resolution Act when doing so would be equitable." *Banner Life Insurance v. Dixon Irrevocable Trust*, 147 Idaho 117, 133, 206 P.3d 481 (2009). Under the circumstances of this case, it would be inequitable and inappropriate to award attorney fees to Ms. Johnson against the estate of John H. Cornell.

The dismissals were not based upon the merits of the claims made on behalf of the deceased John H. Cornell and his estate, but rather upon the abatement of Mr. Cornell's claims against Ms. Johnson upon Mr. Cornell's death. The facts are more fully set forth in the Memorandum Opinions. Ms. Johnson and Mr. Cornell are siblings and were named as recipients of a trust established by their parents.

Following the death of the last surviving parent, Ms. Johnson was required under state law and the terms of the trust to distribute the assets of the trust as expeditiously as possible to herself and Mr. Cornell. In the nearly two (2) years from the last trustor's death through Mr. Cornell's death, Ms. Johnson failed to distribute any part of the Trust to Mr. Cornell. Mr. Cornell waited in vain for funds from the trust to pay for necessary medical care that he could not obtain without money from the trust. Mr. Cornell contacted Ms. Johnson and her attorney, a different attorney than her present attorney,

several times for accountings and for word on the status of the trust. He never received a response.

Ms. Johnson used funds from the trust for her personal expenses while Mr. Cornell was making his requests for information regarding distribution of the trust. Ms. Johnson lived rent free in the home that is included in the Trust. Ms. Johnson entirely thwarted the intentions of her parents in establishing the trust for her brother to receive half the estate. Ms. Johnson dishonored the trust her father placed in her when he named her as the sole person responsible for distribution of the trust. Ms. Johnson acted inappropriately in bestowing the proceeds of the trust upon herself and not share one cent with her brother.

Ms. Johnson egregiously wronged her brother during his lifetime. Now she wishes to continue wronging her brother after his death by not only keeping the assets that were intended for Mr. Cornell, but also raiding his estate for her attorney fees. Certainly, this is not the result that the parents of Mr. Cornell and Ms. Johnson intended when they created the trust.

The law of abatement is an unsettled area of law. The issue of abatement only arose after Mr. Cornell filed his action against Ms. Johnson for her mismanagement of the estate. Although the arguments of Mr. Cornell and his estate were rejected, the arguments were soundly based. The inequitable conduct of Ms. Johnson justified the vigorous arguments made on behalf of Mr. Cornell. I, therefore, reject Ms. Johnson's request for attorney fees from the Estate of John H. Cornell.

Ms. Johnson also requests that she be awarded \$277.15 for the costs of obtaining a copy of her deposition. Ms. Johnson asserts she is entitled to the award as

a prevailing party pursuant to Idaho Rule of Civil Procedure 54(d)(1)(C)(10). Rule 54(d)(1) provides, "Except when otherwise limited by these rules, costs shall be allowed as a matter of right of the prevailing party or parties *unless otherwise ordered by the court.*" (emphasis added). Rule 54(d)(1)(C)(10) relied upon by Ms. Johnson provides, "*When costs are awarded to a party*, such party shall be entitled to the following costs, actually paid, as a matter of right: ... (10) Charges for one (1) copy of any deposition taken by any of the parties to the action in preparation for trial of the action." (emphasis added).

The decision whether to grant costs is a matter of discretion. It would be inequitable to award Ms. Johnson her costs for the same reason it is inequitable to award her attorney fees from the Estate of John H. Cornell.

#### CONCLUSION

Toni Johnson's request for an award of attorney fees and the cost of a deposition from the estate of John H. Cornell is denied for the reasons set forth above.

Dated this 6th day of September, 2013.



Randall W Robinson, Magistrate



## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Judgment of Dismissal was mailed postage pre-paid, on the 9<sup>th</sup> day of September, 2013, to:

Samuel Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

Darrell Aherin  
Aherin, Rice & Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

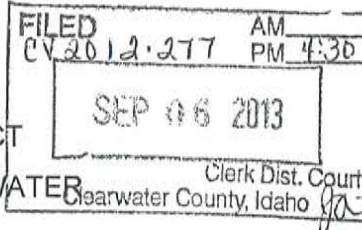
Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: Jodie Williams  
Deputy Clerk







IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

ORDER RE ATTORNEY  
FEES AND COSTS

Based upon Findings of Fact and Conclusions of Law as set forth in the  
Memorandum Opinion Re Attorney Fees and Costs, the Memorandum of Costs and  
Attorney Fees filed on July 5, 2013 is HEREBY DENIED.

Dated this 6th day of September, 2013.

  
\_\_\_\_\_  
Randall W Robinson, Magistrate

# CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order Re Attorney Fees and Costs was mailed postage pre-paid, on the 9<sup>th</sup> day of September, 2013, to:

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Darrell Aherin  
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P.O. Drawer 698  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: Jodie [Signature]

Deputy Clerk



FILED CN12-277 AM 12:38  
SEP 26 2013  
Clark Dist. Court  
Clearwater County, Idaho

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

### MOTION TO AUGMENT RECORD

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston, ID 83501  
(208) 743-1516; Fax: (208) 746-2231

DATED this 25th day of September, 2013.

  
Samuel T. Creason, ISB#8183

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 25th day of September, 2013, I filed the foregoing **MOTION TO AUGMENT RECORD** with the Clerk of the Court, and provided a copy to the following persons:

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501

            
           X             
            
          

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HAND DELIVERED  
OVERNIGHT MAIL  
FAX TRANSMISSION

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

            
           X             
            
          

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OVERNIGHT MAIL  
FAX TRANSMISSION

  
Samuel T. Creason, ISB #8183

FILED	AM
CV 2012-277	PM 4:32
SEP 06 2013	
Clerk Dist. Cou	
Clearwater County, Idaho	

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

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MEMORANDUM OPINION-1  
RE ATTORNEY FEES AND COSTS

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The decision whether to grant costs is a matter of discretion. It would be inequitable to award Ms. Johnson her costs for the same reason it is inequitable to award her attorney fees from the Estate of John H. Cornell.

#### CONCLUSION

Toni Johnson's request for an award of attorney fees and the cost of a deposition from the estate of John H. Cornell is denied for the reasons set forth above.

Dated this 6th day of September, 2013.



Randall W Robinson, Magistrate

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Judgment of Dismissal was mailed postage pre-paid, on the 9<sup>th</sup> day of September, 2013, to:

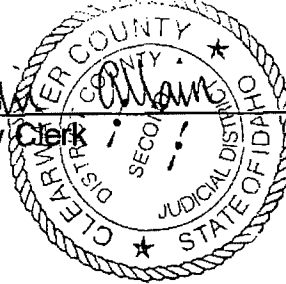
Samuel Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

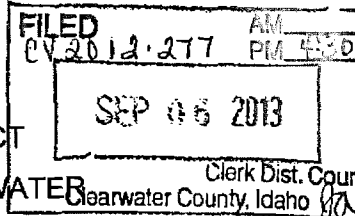
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P.O. Drawer 698  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: J. A. Aherin  
Deputy Clerk





IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE


THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

ORDER RE ATTORNEY  
FEES AND COSTS

Based upon Findings of Fact and Conclusions of Law as set forth in the  
Memorandum Opinion Re Attorney Fees and Costs, the Memorandum of Costs and  
Attorney Fees filed on July 5, 2013 is HEREBY DENIED.

Dated this 6th day of September, 2013.

  
Randall W Robinson, Magistrate

ORDER RE ATTORNEY FEES-1  
AND COSTS

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order Re Attorney Fees and Costs was mailed postage pre-paid, on the 9<sup>th</sup> day of September, 2013, to:

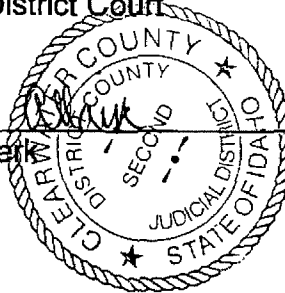
Samuel Creason  
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Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: Jodie Aherin  
Deputy Clerk





Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

)  
) Case No. CV 2012-00277  
)  
)

) **NOTICE OF HEARING**  
)  
)

) **RE: MOTION TO AUGMENT RECORD**  
)

---

Notice is hereby given that the undersigned will call on for hearing Motion to Augment Record on Tuesday, November 5, 2013, at 10:30 a.m., or as soon thereafter as counsel may be heard in the courtroom at the Clearwater County Courthouse, Orofino, Idaho.

DATED this 25<sup>th</sup> day of September, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
\_\_\_\_\_  
Samuel T. Creason, ISB # 8183  
Attorney for Petitioner Kareen Cornell

**CERTIFICATE OF MAILING**


I HEREBY CERTIFY that on this 25<sup>th</sup> day of September, 2013, a copy of the foregoing NOTICE OF HEARING RE: MOTION TO AUGMENT RECORD was served by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, PLLP  
1304 Idaho Street  
P. O. Box 854  
Lewiston, Idaho 83501

☐ FIRST-CLASS MAIL  
☒ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ FAX TRANSMISSION

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, Idaho 83501

☐ FIRST-CLASS MAIL  
☒ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ FAX TRANSMISSION

  
\_\_\_\_\_  
Samuel T. Creason, #8183

**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**NOTICE OF NO OBJECTION**

NOTICE IS HEREBY GIVEN that Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., has no objection to the *Motion to Augment Record* dated September 25, 2013 filed by Kareen Cornell, acting on behalf of the Estate of John Cornell, which is set for hearing on November 5, 2013 at 10:30 a.m., and further has no objection to the *Motion to Augment Record* dated September 12, 2013 filed by Margaret Watkins.

DATED this 4 day of October, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert

Karin Seubert  
Attorney for Respondent

NOTICE OF NO OBJECTION



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *NOTICE OF NO OBJECTION* was, this 4 day of October, 2013,

☒ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
by first class mail; or  
☐ transmitted via facsimile

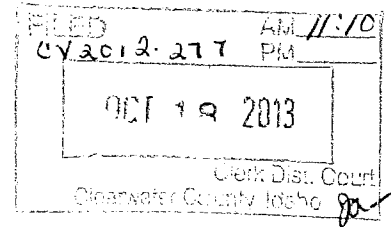
to:

Darrel W. Aherin  
Aherin, Rice and Anegon  
1212 Idaho St.  
P.O. Drawer 698  
Lewiston, ID 83501

Theodore O. Creason  
Samuel T. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By

Karin Seubert  
Karin Seubert



**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

) Case No. CV 2012-00277  
)  
)  
)  
)  
)  
)  
)

THE REVOCABLE FAMILY TRUST  
OF MICHAEL S. CORNELL AND  
ARLIE M. CORNELL.

**APPELLANT'S BRIEF**

---

Appeal from the Magistrate Division of the District Court  
of the Second Judicial District for Clearwater County

---

Honorable Randall W. Robinson, Magistrate Judge Presiding

---

Counsel for Appellant

Theodore O. Creason, ISB #1563  
Samuel T. Creason, ISB #8183  
Creason, Moore, Dokken & Geidl, PLLC  
1219 Idaho Street, P. O. Drawer 835  
Lewiston, ID 83501  
(208) 743-1516

Counsel for Respondent

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street, P.O. Box 854  
Lewiston, ID 83501  
(208) 743-3591

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## **PRELIMINARY STATEMENT**

This case is about the actions of Toni C. Johnson while she served as the successor trustee of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell ("Trust"). Ms. Johnson concedes that during the over two and a half years that she served as successor trustee, she repeatedly made improper use of the Trust res for her own benefit. She also concedes that during that time she engaged in inequitable conduct in order to deprive her brother, John Cornell—a co-beneficiary—of his interest in the Trust res. Now, she argues that because John Cornell died before he could stop her from continuing in this line of conduct, any claims he held abated and there exists no judicial recourse for the heirs of John Cornell. The question before the Court is whether the Estate of John Cornell may pursue recovery of John Cornell's interest in the Trust res.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

The Estate of John Henry Cornell comes before this Court on appeal from dismissal of its petition for supervised administration and court ordered distribution of *The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell*. The magistrate court dismissed the Petition on the grounds that the Estate's claims did not survive the death of John Henry Cornell. Petitioner appeals.

### **B. Course of Proceedings**

This matter comes before the Court after the conclusion of a highly irregular course of proceedings before the magistrate court. The case identified by case number CV 2012-277 was

initiated through a Petition filed by John Henry Cornell on July 11, 2012. John Cornell died from an apparent suicide on August 20, 2012. Ms. Johnson filed a Motion to Dismiss on September 17, 2012, arguing that the claims in John Cornell's petition abated upon his death. Ms. Johnson also argued that because John died, there existed no legitimate party in interest unless and until the Estate was substituted into the action pursuant to Idaho Rule of Civil Procedure 25(a)(1).

For reasons beyond Kareen Cornell's control, John Cornell's attorney continued to prosecute the petition in John Cornell's name, personally. In late November 2012, Ms. Cornell appeared before the Court and notified the Court that she objected to any other person acting on behalf of her late husband. While the magistrate court invited Ms. Cornell to submit briefing on pending action, it did not bring her or the Estate into the litigation. Thus, Ms. Cornell's briefing was, in effect, *amici* briefing. On February 15, 2013, this Court issued a Memorandum Opinion. In that opinion, the Court dismissed the petition filed by John Cornell, personally. However, the Court expressly invited Ms. Cornell to file claims on behalf of the Estate.

Ms. Cornell responded to the Court's invitation by filing the Estate's Petition on February 28, 2013. While many of the Estate's claims were identical to those raised by John Cornell in his August 2012 petition, the Estate also raised additional claims. The Estate's Petition alleged that Ms. Johnson (1) failed to act in conformity with the terms of the Trust; (2) breached her fiduciary duties when acting in her capacity as Trustee; (3) engaged in equitable conversion of the property belonging to John Cornell by refusing to distribute the property; and (4) was unjustly enriched by (a) misusing Trust assets for personal desires, and (b) refusing to comply with the

terms of the Trust and her fiduciary duties in order to effect a distribution in her favor. The Estate sought supervised administration, court ordered distribution of the Trust, and a judgment against Ms. Johnson for injuries caused to the Trust. The Petition set forth the following legal and equitable causes of action: (A) breach of fiduciary duty; (B) constructive trust; (C) breach of contract; (D) conversion; and (E) unjust enrichment.

No Answer has ever been filed to those allegations. Instead, Ms. Johnson filed a Motion to Dismiss the Estate's Petition on March 1. Ms. Johnson argued that the petition should be dismissed because (1) the Estate was bound by the Court's February 15 memorandum opinion, and (2) the Estate's Petition either failed to state a cause of action or stated causes of action which abated upon the death of John Cornell. Ms. Johnson based her abatement arguments on the same theory that the magistrate court adopted in dismissing Mr. Cornell's claims.

The magistrate court granted Ms. Johnson's motion on June 21. In its memorandum opinion, the court concluded that (A) all claims for breach of fiduciary duty abated, at common law and under Idaho statute, upon death; (B) the doctrine of constructive trust was inapplicable and an action under that doctrine was in tort, which abated upon death; (C) the claims for breach of contract were co-extensive with the statutory duties of a trustee and, therefore, were breach of fiduciary duty claims which abated upon death; (D) claims for equitable conversion sounded in tort and, therefore, abated upon death; and (E) claims for unjust enrichment sounded in tort and, therefore, abated upon death. The magistrate court based its ruling upon the following conclusions of law: (1) the Idaho Supreme Court Opinion of *Bishop v. Owens*, 152 Idaho 616, 619 (2012) stands for the proposition that all claims sounding in tort abate at common law upon



the death of the claimant; and (2) the Idaho legislature did not abrogate that rule with the amendment of Idaho Code § 5-327, except for claims for recovery of medical expenses, out of pocket expenses, and lost wages. As set forth herein, the court's conclusions are erroneous.

### **C. Statement of Facts**

Michael and Arlie Cornell established The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell ("Trust") on November 1, 1996. The Trust was established to provide for Michael and Arlie during their lifetimes, with the remainder to be distributed to their two children: Toni Johnson and John Cornell. Arlie Cornell died on November 9, 2008. Michael Cornell died on December 15, 2009. Ms. Johnson has been the sole Trustee since that time.

As a successor trustee, Ms. Johnson was to have a very limited role. Ms. Johnson's sole duty as trustee was to distribute the trust assets. Over the months and years following Michael Cornell's death, Ms. Johnson failed to distribute the Trust. Instead, she "egregiously wronged her brother during his lifetime. *Mem. Op. re Attorney Fees and Costs* 3. "Ms. Johnson acted inappropriately in bestowing the proceeds of the trust upon herself and not shar[ing] one cent with her brother." *Id.* She refused to distribute the Trust, despite John Cornell's repeated objections and pleas that she do so, in part, so that he could "pay for necessary medical care that he could not obtain without money from the trust." *Id.* at 2. John Cornell was never able to compel distribution before his death on August 20, 2012.

Ms. Johnson's discovery responses in this case substantiate the concerns and frustrations that Mr. Cornell raised in the over two and one-half years between the surviving trustor's death and Mr. Cornell's death. At her deposition, Ms. Johnson admitted that she routinely makes

personal use of the real and personal property of the Trust. She lives rent-free in the home that is included in the Trust. She has commingled cash assets of the Trust with her own cash assets. She has depleted the cash assets of the Trust, with not only expenses of the Trust but also her personal expenses. To date, the only distributions that Ms. Johnson has made are the unreported distributions made through her personal use of the Trust res.

### **ISSUE PRESENTED ON APPEAL**

1. The issue before the Court is the survival of causes of actions regarding (a) proper administration of the Trust, and (b) proper distribution of assets to which the Trust is title owner. Under its terms, the Trust was to terminate upon the death of the surviving trustor—in this case, December 15, 2009. As successor Trustee, Toni Johnson was to distribute the Trust res “as soon as reasonably possible.” Ms. Johnson concedes that she acted inequitably: she mismanaged the Trust, she commingled assets, she used Trust funds for personal use, and she refused to distribute the Trust res, despite John Cornell’s demands. John Cornell died in August 2012. May the Estate of John Cornell pursue not only his interests in the remaining Trust property, but also claims for the diminution of that property through mismanagement by Toni Cornell?

### **ARGUMENT**

The Estate’s Petition raises claims against Ms. Johnson based upon conduct occurring since December 15, 2009, the date she accepted appointment as successor trustee of the Trust. The law governing survival of actions upon the death of the injured party was changed on July 1, 2010, when the amended Idaho Code § 5-327 became effective. Prior to that point in time, issues of survival upon the death of the injured party were governed by the common law. Thus, this case requires the Court to determine whether the Estate’s claims survive at common law and under section 5-327. The magistrate court granted Ms. Johnson’s motion to dismiss on the grounds that (1) under the common law, all causes of action sounding in tort abate upon the death of the injured party; and (2) under Idaho Code § 5-327(2), all causes of action sounding in

tort are limited, upon the death of the injured party, to recovery for damages not sought in the Estate's petition.

**A. Standard of Review**

The magistrate court dismissed this action on a summary judgment standard, because it considered affidavits filed by the parties. *See* Idaho R. Civ. P. 56(c). An appellate Court exercises *de novo* review over a grant of summary judgment. *Constr. Mgmt. Sys., Inc. v. Assurance Co. of Am.*, 135 Idaho 680, 682, 23 P.3d 142, 144 (2001).

Summary judgment is only appropriate when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Idaho R. Civ. P. 56(c). When determining whether a genuine issue of material fact exists, the Court "liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party's favor." *Constr. Mgmt. Sys., Inc.*, 135 Idaho at 682, 23 P.3d at 144. If, as the result of such a liberal construction, the Court finds that reasonable persons could reach different findings or draw conflicting inferences from the evidence, the Court must deny the motion. Thus, Ms. Johnson carries the burden of proving that reasonable persons could not draw conflicting inference from the evidence, when the record is construed in a light most favorable to the Estate.

**B. The Estate's Causes of Action Did Not Abate at Common Law.**

**1. The Estate's Tort Claims Did Not Abate**

The Estate's tort claims did not abate at common law, because the claims seek damages for the deprivation and diminution of a property interest. The magistrate court ruled that, at

common law, every cause of action sounding in tort abates upon the death of the injured party. The court based its ruling entirely on the Idaho Supreme Court case of *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012). The magistrate court found the following language from *Bishop* dispositive in this case: “Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate.” *Id.* at 619, 272 P.3d at 1250. The magistrate court’s broad application of *Bishop* is in error. The *Bishop* Court identified the general rule regarding abatement of tort claims at common law. *Id.* While that general rule is certainly applicable to this case, it is not dispositive. The *Bishop* Court was not presented with facts that required it to analyze some of the more nuanced applications of the abatement doctrine. The magistrate court erred in applying the general rule of *Bishop* to this case because (a) the Estate’s tort claims seek redress for injury done to the decedent’s property interests; (b) the Estate’s tort claims are founded upon a remedial statute; and (c) the Estate’s tort claims are not legal claims but rather claims in equity. As set forth below, each of these distinctions dictates a finding that the Estate’s tort claims survived the death of John Cornell.

The *Bishop* Opinion does not—either by its facts or by its language—set precedent regarding abatement of causes of action Estate’s claims. The *Bishop* Court was presented with facts far different from this case. First, the decedent in *Bishop* brought a legal malpractice claim, alleging that her former attorney injured her by failing to properly advise her about the consequences of a negotiated settlement with respect to subrogated interests. *Id.* at 618, 272 P.3d at 1249. Here, the Estate claims that the defendant injured John Cornell by depriving him his property (which she still retains) and, at the same time, diminishing the value of that

property. Second, the decedent in *Bishop* did not rely upon a statute or equitable doctrine to identify a unique duty or standard of care; she relied upon a legal representation agreement which applied the same standard to which all Idaho attorneys are held, the Idaho Rules of Professional Responsibility. *Id.* at 620, 272 P.3d at 1251. Here, the Estate has raised tort claims based upon the remedial statutes set forth in the Idaho Code which govern the conduct of trustees, and based upon equitable doctrines. Third, the decedent in *Bishop* sought an award of money damages, not relief in the form of restoration and distribution of certain identified assets to which she believed she was entitled. *Id.* at 619, 272 P.3d at 1250. Here, the Estate seeks restoration and distribution of certain assets—the Trust res. These three factual distinctions explain why the *Bishop* Court had no need to proceed beyond a recitation of the general rule and evidence why the magistrate court erred in giving *Bishop* such a broad interpretation.

The language of the *Bishop* Opinion does not support the magistrate court's interpretation of the *Bishop* language as universal. The *Bishop* Opinion cites *Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919) as support for its general rule. *Kloepfer* makes express that which *Bishop* assumes: "As a general rule, in the absence of a statute providing otherwise, causes of action ex contractu survive, while causes ex delicto do not. **However, there are well-recognized exceptions to both branches of the rule.**" *Id.* (emphasis added). These well-recognized exceptions mandate survival of the Estate's claims.

Subsequent Supreme Court case law also conflicts with the magistrate court's interpretation. Based on *Bishop*, the magistrate court ruled that "in order for John's claims to survive his death, his claims must sound in contract, and not in tort." *Memorandum Op. re:*

*Kareen Cornell* 10. In the January 2013 case of *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, the Supreme Court considered whether a given tort claim could be assigned after the death of the injured party, particularly in light of its opinion in *Bishop*. 154 Idaho 37, 293 P.3d 661, 667 (2013). The Court affirmed the rule from *MacLoed v. Stelle*, where it held that “‘if [a tort claim] survives, it may be assigned; if not, it may not,’ [the Court] also held that an ‘injury [that] lessens the estate of the injured party does survive, and that is assignable.’” *Luciani*, 154 Idaho at \_\_\_, 293 P.3d at 667 (quoting *MacLoed*, 43 Idaho 64, 75, 249 P. 254, 257 (1926)). Thus, even as recent as January 2013, the Idaho Supreme Court assumed that certain tort claims survive the death of the injured party, even after *Bishop*.

**a. The Estate's tort claims did not abate because the claims seek redress for injury to property.**

One of the well-recognized exceptions to the rule of abatement of tort claims is that tort claims survive where they are actions for recovery or protection of a property interest.

The general rule is that, in addition to the causes of action arising out of contract recognized at common law, causes of action arising from torts to real and personal property survive and pass to the personal representative of the decedent, while purely personal torts do not survive in the absence of statutory provision.

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 51. Thus, in cases where the injured party alleged an injury to his property—such as the existence or amount of his interest in a trust—the claim survives. See *Barnes v. Barnes*, 135 Idaho 103, 105, 15 P.3d 816, 818 (2000) (holding that while a divorce proceeding abates upon death, “[i]f property issues are involved, the action continues solely to resolve those issues”).

Here, there exists a genuine issue of material fact as to whether Mr. Cornell held a vested property interest in the Trust res at the time of his death. Upon accepting appointment as successor trustee, Ms. Johnson's obligations to the Trust and Mr. Cornell (as the beneficiary) were clear.

On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: TONI C. JOHNSON and JOHN H. CORNELL.

*Trust* § 4.03. However, the very next provision of the Trust gives rise to much of the confusion in this matter. The Trust proceeds to set forth the terms for distribution in the event that one or both of the Trustors' children should die.

If any child . . . should die prior to the above distribution, then the Trustee shall distribute all of such deceased child's share to his or her surviving issue in equal shares. . . . If there is no surviving issue, then all of the deceased child's share of the Trust Estate shall be added to the shares set aside for the . . . other living child . . . ."

*Trust* § 4.03(a). Ms. Johnson argued that because John Cornell died before he could compel her to distribute the Trust res, any interest he held in the Trust died with him; thus, she should receive the entirety of the Trust res. The Estate maintains that John Cornell's interest in the Trust res vested upon the death of Michael Cornell. The Estate also argues that even if John Cornell's interest did not vest upon the death of Michael Cornell, it vested at the point in time where equity would presume proper distribution because "equity regards that as done which ought to be done." See *First Sec. Bank of Idaho, Nat. Ass'n v. Rogers*, 91 Idaho 654, 657, 429 P.2d 386, 389 (1967).



The magistrate court ruled that because John Cornell died prior to distribution, he could not have obtained a vested interest in the Trust res.<sup>1</sup> *See Memorandum Op. re: Kareen Cornell* 12. The magistrate court did not provide any discussion or analysis regarding ambiguity within the document or the intent of the Trustors. The magistrate court did not provide any discussion or analysis regarding the Estate's arguments that, at the very latest, John Cornell's interest vested under equity. These omissions are of particular import because the magistrate court later found that Ms. Johnson acted against the intent of the Trustors. *See Memorandum Op. re: Attorney Fees and Costs* 3. Therefore, the magistrate erred when it ruled that, as a matter of law, John Cornell did not hold a vested interest.

**b. The Estate's tort claims did not abate because the claims are founded upon a remedial statute.**

The survivability of this action is further supported by the fact that the claims arise pursuant to a remedial statute. In *Bishop*, the decedent merely relied on a common law duty. Here, the Estate seeks recovery based, in part, upon a trustee's breach of fiduciary duty, as defined in Idaho Code §§ 15-7-101 through 15-7-601. "A cause of action that is founded on a remedial statute . . . survives the death of the party possessing the cause of action." 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 59. Therefore, the Estate's breach of fiduciary duty claims did not abate.

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<sup>1</sup> The magistrate court was not explicit about why it rejected the Estate's arguments regarding continuing jurisdiction over administration of the Trust. It appears, however, that the magistrate court rejected that argument based upon the court's finding that Toni Johnson was the only remaining entity with an interest in the Trust.

c. **The Estate's tort claims did not abate because the claims are not legal claims, but claims in equity.**

Finally, the survivability of this action is further supported by the fact that it seeks recovery through equitable causes of action. In *Bishop*, the only cause of action was the legal theory of malpractice. Here, the Estate has raised several equitable doctrines entitling it to relief. "In equity, abatement signifies a present, temporary suspension of further proceedings in a suit because of want of proper parties. It is an interruption or suspension of a suit, the equivalent of a stay of proceedings, and the suit may be revived and proceed to its regular determination." 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 1 (footnotes omitted).

The principle that a cause of action expires with the death or disability of a party generally does not apply to suits in equity; **equitable remedies exist to the same extent in favor of and against executors and administrators** as they do against the decedent, as long as the court can continue to grant effective relief in spite of the death. **One of the main reasons for this stance for suits in equity is that such suits primarily pertain to property rights.**

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 60 (footnotes omitted) (emphases added).<sup>2</sup>

The magistrate court erred in ruling that the claims of conversion, constructive trust, and unjust enrichment abated under *Bishop*. See *Memorandum Op. re: Kareen Cornell* 13-15.

**Conversion.** The Estate seeks recovery under the equitable doctrine of conversion. "The act of wrongfully and permanently depriving someone of his property establishes conversion." *In re Pangburn*, 154 Idaho 233, 296 P.3d 1080, 1085 (2013). These are the exact elements

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<sup>2</sup> See also *Barnes Coal Corp. v. Retail Coal Merchants Ass'n*, 128 F.2d 645, 649 (4th Cir. 1942); *Glojek v. Glojek*, 254 Wis. 109, 115, 35 N.W.2d 203, 206 (1948); *Hughey v. Mooney*, 282 S.C. 597, 602, 320 S.E.2d 475, 477 (Ct. App. 1984); *Miller v. Hayman*, 766 So. 2d 1116, 1118 n.1 (Fla. Dist. Ct. App. 2000)

alleged by the Estate. As set forth above, a genuine issue of material fact exists regarding whether John Cornell held a vested interest in the Trust res at the time of his death. “At common law, the right to bring an action for the conversion of goods in the lifetime of the decedent owner generally survived to the personal representative . . . .” 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 76. The consequence of the magistrate’s ruling evidences the reason for the equitable exception to the rule of abatement: if the Estate’s claims did not survive John Cornell’s death, then Ms. Johnson will be allowed to enjoy property which she did not own, and which she now possess only as a result of her inequitable conduct. Such a result is patently inequitable. The Estate’s claims for redress through the doctrine of conversion did not abate.

**Constructive Trust.** The Estate seeks recovery under the the equitable doctrine of constructive trust. It is “the fundamental rule of equity that equity regards that as done which ought to be done.” *See First Sec. Bank of Idaho*, 91 Idaho at 657, 429 P.2d at 389 (discussing basis of doctrine of equitable conversion). Ms. Johnson ought to have distributed the Trust res long before the death of John Cornell. It is undisputed that Ms. Johnson engaged in inequitable conduct by retaining legal title to the assets of the Trust in the name of the Trust. “When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.” TRUST, Black’s Law Dictionary (9th ed. 2009), trust (internal quotation marks and citation omitted); *see also Hanger v. Hess*, 49 Idaho 325, 328, 288 P. 160, 161 (1930). The doctrine of constructive trust is a description of the nature by which a wrongdoer holds the property of another; the court deems that property as already belonging to the injured party at some earlier point in time.

The court's ruling regarding abatement is erroneous. While the Idaho Supreme Court has not expressly addressed the issue of survival of constructive trust claims at common law, it presumed their survival in *Brasch v. Brasch*, 55 Idaho 777, 47 P.2d 676, 678 (1935). The Estate's claims for redress through the doctrine of constructive trust did not abate.

The magistrate court also supported its grant of summary judgment against this claim by ruling that a constructive trust could not have arisen in this case as a matter of law: "As this case already addresses a legal trust, there is no necessity to resort to the legal fiction of a constructive trust." *Memorandum Op. re: Kareen Cornell* 13. The Estate is unaware of any authority argued by the parties (or otherwise existing at law or in equity) supporting a finding that the doctrine of constructive trust is unavailable in cases involving express trusts. The constructive trust in which the Trust held John Cornell's property is distinct from the actual trust arrangement that existed prior to the constructive trust arising. The doctrine of constructive trust is particularly applicable to the facts of this case. Ms. Johnson ought to have distributed the Trust res as soon as reasonably practicable when the Trust automatically terminated upon the death of Michael Cornell. Ms. Johnson acted inequitably by retaining the Trust res in name of the Trust, while using it for her own benefit. Reasonable persons could reach different findings or draw conflicting inferences from the evidence with respect to whether a constructive trust arose based upon (i) the extended period of time between the death of Michael Cornell and the death of John Cornell; and (ii) the undisputed inequitable conduct by Ms. Johnson. Therefore, the magistrate court erred in granting summary judgment on this claim.

**Unjust Enrichment.** The Estate seeks recovery under the equitable doctrine of unjust enrichment. “Unjust enrichment occurs where [offending party] receives a benefit which would be inequitable to retain without compensating the [injured party] to the extent that retention is unjust.” *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 557, 165 P.3d 261, 271 (2007). The damages available to the claimant on an unjust enrichment claim is the value of the amount by which the offending party was unjustly enriched. *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004). Like constructive trust, unjust enrichment is an equitable doctrine that seeks to return to the injured party those amounts which were due to him or her in equity; amounts which equity deems property of the injured party. If the Estate prevails on its unjust enrichment claim, it will have established that John Cornell held an equitable interest in property prior to his death. The Estate has a statutory duty to recover property of the decedent and distribute it in probate. *See* Idaho Code § 15-3-709. The Estate’s claims for redress through the doctrine of unjust enrichment did not abate.

## **2. The Estate’s Breach of Contract Claims Did Not Abate**

As with the tort claims, the magistrate court relied exclusively on *Bishop* to support its ruling of abatement of the contract claims. The court interpreted *Bishop* as standing for the proposition that where the duties placed upon the defendant could be found at law, all contract claims should be re-characterized as tort claims. *Memorandum Op. re: Kareen Cornell* 13-14. The magistrate court found that the Estate failed “to point out any way in which the Trust instrument imposes any duties upon Toni [Johnson] that are not also imposed by the Probate Code.” *Id.* As a result, the magistrate court held the contract claims were actually tort claims

and, therefore, abated upon the death of John Cornell. The court ruling was erroneous because (a) the analysis in *Bishop* was in response to a relationship that was not contractual in nature; and (b) the Estate's contract claims identify contractual duties which do not exist at law.

The magistrate court's reliance upon *Bishop* to re-characterize the Estate's contract claims was in error. In *Bishop*, the question before the court was whether the decedent could pursue a legal malpractice action through breach of contract claims. *Bishop*, 152 Idaho at 620, 272 P.3d at 1251. The plaintiff's theory in *Bishop* was that it could either sue for legal malpractice, which sounded in pure tort, or for breach of the legal representation agreement, which sounded in contract. *Id.* The *Bishop* Court actually held this theory correct. *See id.* The reason the contract claims failed in *Bishop* is that the plaintiff had not alleged breach of a specific term within the contract, but instead alleged breach of the term referencing the common law duties owed by every attorney to that attorney's clients. *Id.* at 621, 272 P.3d at 1252. The *Bishop* Court explained that if such a provision were enough to transform the pure tort action of legal malpractice into a breach of contract action, there would exist "a per se breach of contract action in every legal malpractice action." *Id.* The relationship between attorney and client is not contractual in nature. *Id.* at 620, 272 P.3d at 1251. The Estate's action is far different than that in *Bishop*.

The relationship between a trustee and a beneficiary is contractual in nature. "A trust is not itself a separate legal entity that can own property; rather, it is a relationship having certain attributes." *In re Thompson*, 454 B.R. 486, 492 (Bankr. D. Idaho 2011). "A trust creates a fiduciary relationship in which the trustee is the holder of legal title to the property subject to the

beneficial interest of the beneficiary.” *DBSI/TRI V v. Bender*, 130 Idaho 796, 808, 948 P.2d 151, 163 (1997). The scope and nature of that relationship is defined by the terms of the trust, i.e. the contract. A trustee’s fiduciary duties and contractual duties are intertwined, yet distinguishable.

The Restatement (Third) of Trusts § 2 defines a trust as

... a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of ... one or more persons, at least one of whom is not the sole trustee.

The Estate has identified specific provisions within the Trust document—the trust contract—which Ms. Johnson breached.

- 4.03 & 4.04: The Trust terminates automatically upon the death of the surviving Trustor and the successor Trustee is to distribute the property “as soon as reasonably possible.”
- 5.01: The only property which may be retained in the Trust after the death of the surviving Trustor is property productive of income.
- 8.02: The successor Trustee shall render an accounting from time to time.

The Estate alleges that Ms. Johnson breached these contractual provisions through her conduct. These provisions set forth specific duties outside the general fiduciary duties found in the probate code. There exist clear and distinct terms in the trust contract regarding conduct after the death of Michael Cornell. The Estate’s allegation that Ms. Johnson breached those terms is far different than a general allegation that she did not administer the trust expeditiously in accordance with Idaho Code § 15-7-301. The Estate’s allegation that Ms. Johnson breached the trust contract by retaining non-income producing property in the Trust, identifies a duty that cannot be found anywhere in statute. A breach of contract claim is distinct from a breach of fiduciary duty claim. A breach of contract claim focuses on the trustee’s failure to adhere to the



terms of the trust document; a breach of fiduciary duty claim focuses on the trustee's failure to act in accordance with the standard of conduct required of the trustee under statutory and common law. To argue that no contractual claim may lie against the trustee is to argue that the terms of the trust document have no substance.

**C. The Estate's Causes of Action Did Not Abate Under Idaho Code § 5-327(2).**

The magistrate court held that the Estate's causes of action arising after July 1, 2010 abated pursuant to Idaho Code § 5-327(2). It based this holding on its interpretation of subsection 5-327(2) as allowing survival in property damage cases only for recovery for medical expenses, other out-of-pocket expenses, and loss of earnings. The court's error was the result of construing the language of the statute in such a rigid manner as to produce an absurd result upon application.

While the Estate's causes of action survived John Cornell's death under the common law, the Idaho legislature made survival explicit in its enactment of Idaho Code § 5-327(2):

A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence. Such action shall be commenced or, if already commenced at the time of the death of the injured person, shall be thereafter prosecuted by the personal representative of the estate of the deceased person or, if there be no personal representative appointed, then by those persons who would be entitled to succeed to the property of the deceased person according to the provisions of section 5-311(2)(a), Idaho Code.

The first sentence of subsection 327(2) states that tort causes of action for “personal injury or property damage” do not abate upon the death of the injured party. The second sentence then contains a proviso limiting recovery to medical expenses, other out-of-pocket expenses, and loss of earnings. Because this proviso does not expressly limit itself to the antecedent of “personal injury” claims, the magistrate court concluded that the proviso also applies to causes of action for property damage.

The proper application of Idaho Code § 5-327(2) is revealed through the syntactic and contextual canons of statutory interpretations. The following principles of statutory interpretation should be employed here:

1. the objective is to derive the intent of the legislature;
2. language should be interpreted in the context of the entire document;
3. language should be given its plain, usual, and ordinary meaning; and
4. language is to be interpreted in accord with common sense and reason.

See *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011) and *Smith v. Dep’t of Employment*, 100 Idaho 520, 522, 602 P.2d 18, 20 (1979). The issue before this Court is whether the legislature intended the second-sentence proviso to apply to both personal injury actions and property damage actions.

The subordinate clause at the end of the second sentence supports an interpretation which limits the proviso to personal injury cases. The subordinate clause restricts recovery in the listed areas to those damages which resulted from the wrongful act or negligence; and incurred “prior to the death of the injured person.” The limitation of damages to those incurred prior to the death of the injured person evidences the legislature’s intent to limit recovery in personal injury

actions for economic harms suffered, excluding damages such as pain and suffering. A property damage action, by its nature, seeks only recovery economic harm suffered.

Interpreting the listed areas of recovery in accord with common sense and reason, the listed areas for recovery support an interpretation which limits the proviso to personal injury cases. It is the rare property damage case where “medical expenses” are incurred. It is also rare to have a property damage case where the plaintiff seeks “loss of earnings.” Those two areas are, however, common in personal injury actions. Not only do these areas of recovery counsel against applying the proviso to the property damage case, they support allowing full recovery in property damage cases. In one sense, every property damage claim could be categorized as a claim for recovery of out of pocket expenses.

The magistrate courts rigid interpretation of Idaho Code § 5-327(2) was in error. The subsection, however, provides a sensible and reasonable result when interpreted through the syntactic and contextual canons of statutory interpretations. The Estate asks this Court to reverse the magistrate court’s grant of summary judgment and rule that the second sentence proviso in the subsection does not constitute a limitation on property damage actions.

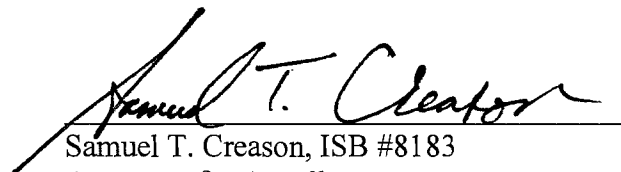
### **CONCLUSION**

Both the common law and Idaho Code § 5-327 support a ruling that the causes of action set forth in the Estate’s Petition survived the death of John Cornell. The Estate has raised several claims in law and equity seeking recovery of that property in which John Cornell held an interest at the time of his death. The property interests of a decedent do not die with that decedent. Neither do the decedents claims for damage to his property done by others. Both the property

interests and the claims for property damage pass to his Estate, where the interests may be pursued on behalf of the beneficiaries of the Estate. Ms. Johnson has conceded that she acted inequitably. Neither law nor equity allows her to continue her inequitable conduct by now depriving John Cornell's heirs of his property. The Estate asks this Court to reverse the magistrate court's ruling and remand the case for further proceedings.

DATED this 17<sup>th</sup> day of October, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
Samuel T. Creason, ISB #8183  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that two copies of the foregoing APPELLANT'S BRIEF were served by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
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Lewiston, ID 83501

  x    
\_\_\_\_\_  
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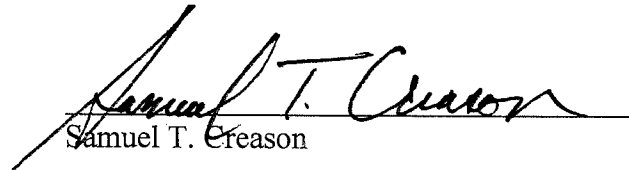
FIRST-CLASS MAIL  
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OVERNIGHT MAIL  
FAX TRANSMISSION

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
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Lewiston, ID 83501

  x    
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

FIRST-CLASS MAIL  
HAND DELIVERED  
OVERNIGHT MAIL  
FAX TRANSMISSION

DATED this 17<sup>th</sup> day of October, 2013.

  
\_\_\_\_\_  
Samuel T. Creason



AHERIN, RICE & ANEGON  
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ISB# 1534

Attorney for Margaret Watkins

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL,

NO. CV 2012-00277

ORDER GRANTING MOTION TO  
AUGMENT RECORD

On September 13, 2013, Margaret Watkins filed a Motion to Augment the Record to allow this Court to make a part of the record it considers in the pending Appeal, the Magistrate Memorandum Opinion Re Attorney Fees and Costs entered September 6, 2013, and the Order Re Attorney Fees and Costs entered September 6, 2013.

A Notice of Non-Opposition was filed by Respondent, Toni C. Johnson, to Margaret Watkins' Motion to Augment the Record.

Based on the forgoing, the record is augmented to include the Magistrate Memorandum Opinion Re Attorney Fees and Costs and Order Re Attorney Fees and Costs.

DATED this 29<sup>th</sup> day of October, 2013.

  
\_\_\_\_\_  
JUDGE

ORDER GRANTING MOTION TO AUGMENT RECORD -- 1

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CERTIFICATE OF SERVICE

I, Barbie Deyo, hereby certify that on the 30<sup>th</sup> day of October, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

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Creason, Moore, Dokken & Geidl  
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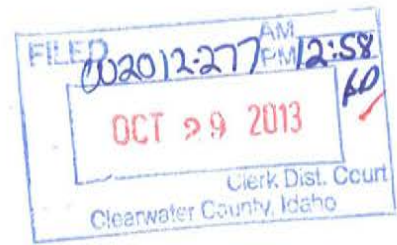
Clerk of the Court

By Barbie Deyo  
Deputy Clerk





Theodore O. Creason, ISB #1563  
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Facsimile: (208) 746-2231  
Attorneys for Kareen Cornell



**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

)  
) Case No. CV 2012-00277  
)

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

)  
) **ORDER RE: AUGMENT RECORD**  
)  
)

---

On September 26, 2013, Kareen Cornell filed a Motion to Augment the Record to allow this court to make a part of the record it considers in the pending Appeal the Magistrate Memorandum Opinion Re: Attorney Fees and Costs entered September 6, 2013 and the Order Re: Attorney Fees and Costs entered September 6, 2013.

A Notice of Non-Opposition was filed by Respondent, Toni C. Johnson to Kareen Cornell's Motion to Augment the Record.

Based on the forgoing the record is augmented to include the Magistrate's Memorandum Opinion Re: Attorney Fees and Costs and Order Re: Attorney Fees and Costs.

DATED this 29<sup>th</sup> day of <sup>October</sup> ~~November~~ 2013.

  
\_\_\_\_\_  
Judge

ORDER RE: AUGMENT RECORD - 1

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston ID 83501  
(208)743-1516; Fax(208)746-2231

**CERTIFICATE OF SERVICE**

I, Barbie Dey, hereby certify that on the 30<sup>th</sup> day of October, ~~November~~, 2013, I caused to be served a copy/copies of the foregoing by the method indicated below and addressed to the following:

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Aherin, Rice & Anegon  
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Samuel T. Creason  
Creason, Moore, Dokken & Geidl, PLLC  
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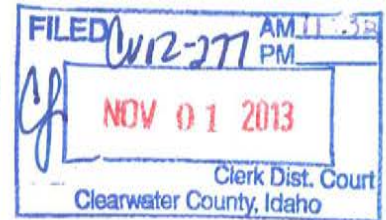
Clerk of the Court

By: Barbie Dey  
Deputy Clerk

ORDER RE: AUGMENT RECORD - 2

Creason, Moore, Dokken & Geidl, PLLC  
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**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
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208/743-3591  
Idaho State Bar No. 7813



IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

Case No. CV 2012-00277

**STIPULATION TO AUGMENT**

COMES NOW Margaret Watkins, by and through her attorney of record, Darrel Aherin of Aherin, Rice and Anegon, Kareen Cornell, as personal representative of the Estate of John Cornell, through the Estate's attorney of record, Samuel Creason of Creason, Moore, Dokken and Geidl, and Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and pursuant to I.R.C.P. 6(e)(3) and 83(q), hereby stipulate and agree to entry of an order augmenting the clerk's record to add the *Memorandum Opinion re: Attorney Fees and Costs* entered by the Magistrate Court in this proceeding on September 6, 2013, a copy of which is attached as Exhibit A hereto, and the *Order re: Attorney Fees and Costs* entered by the Magistrate Court in this proceeding on September 6, 2013, a copy of which is attached as Exhibit B hereto. The parties hereby waive hearing on the *Motion to Augment Record* dated September 25, 2013 filed by Kareen Cornell and on the *Motion to Augment Record* dated September 12, 2013 filed by Margaret Watkins,

STIPULATION TO AUGMENT

and agree to entry of the proposed Order filed herewith without further notice.

DATED this 30<sup>th</sup> day of October, 2013.

AHERIN, RICE AND ANEGON

By   
DARELL W. AHERIN

DATED this 30 day of October, 2013.

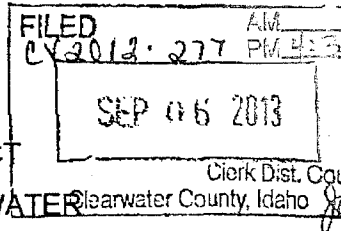
CREASON, MOORE, DOKKEN & GEIDL, PLLC

By   
SAMUEL T. CREASON

DATED this 29 day of October, 2013.

JONES, BROWER & CALLERY, P.L.L.C.

By   
KARIN SEUBERT



IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

MEMORANDUM OPINION RE  
ATTORNEY FEES AND COSTS

The issue addressed is whether to grant Toni Johnson attorney fees and costs against the estate of John H. Cornell as requested by the Memorandum of Costs and Attorney Fees filed on July 5, 2013. Darrell Aherin Esq., appearing on behalf of the deceased John H. Cornell, filed an objection and memorandum in opposition to the request as did Samuel Creason, who appeared on behalf of Kareen Cornell, the personal representative of the estate of John H. Cornell. Oral argument was heard on September 4, 2013, Karen Seubert presenting argument on behalf of Ms. Johnson and Mr. Aherin and Mr. Creason presenting argument as well.

On February 15, 2013, this Court dismissed the claims of the deceased John H. Cornell and on June 21, 2013 dismissed the claims of Karen Cornell. As the prevailing party, Ms. Johnson seeks attorney fees and the costs of a deposition pursuant to Idaho Code § 15-8-208. Idaho Code § 15-8-208 provides: "Either the district court or the court on appeal may, in its discretion, order costs, including reasonable attorney's fees, to be awarded to any party (a) from any party to the proceedings."

Ms. Seubert conceded at oral argument, and I so find, that the arguments made by Mr. Aherin and Mr. Creason were not made frivolously, unreasonably, or without

MEMORANDUM OPINION-1  
RE ATTORNEY FEES AND COSTS



foundation. The arguments that were made were cogent and reasoned and excellent in shedding light on an abstruse area of the law. Therefore, the issue is whether this Court should exercise its discretion to award attorney fees and costs in favor of Toni Johnson against the Estate of John H. Cornell.

The Idaho Supreme Court has observed that Idaho Code § 15-8-208 "allows courts to award fees in cases governed by the Trust and Estate Dispute Resolution Act when doing so would be equitable." *Banner Life Insurance v. Dixson Irrevocable Trust*, 147 Idaho 117, 133, 206 P.3d 481 (2009). Under the circumstances of this case, it would be inequitable and inappropriate to award attorney fees to Ms. Johnson against the estate of John H. Cornell.

The dismissals were not based upon the merits of the claims made on behalf of the deceased John H. Cornell and his estate, but rather upon the abatement of Mr. Cornell's claims against Ms. Johnson upon Mr. Cornell's death. The facts are more fully set forth in the Memorandum Opinions. Ms. Johnson and Mr. Cornell are siblings and were named as recipients of a trust established by their parents.

Following the death of the last surviving parent, Ms. Johnson was required under state law and the terms of the trust to distribute the assets of the trust as expeditiously as possible to herself and Mr. Cornell. In the nearly two (2) years from the last trustor's death through Mr. Cornell's death, Ms. Johnson failed to distribute any part of the Trust to Mr. Cornell. Mr. Cornell waited in vain for funds from the trust to pay for necessary medical care that he could not obtain without money from the trust. Mr. Cornell contacted Ms. Johnson and her attorney, a different attorney than her present attorney,

several times for accountings and for word on the status of the trust. He never received a response.

Ms. Johnson used funds from the trust for her personal expenses while Mr. Cornell was making his requests for information regarding distribution of the trust. Ms. Johnson lived rent free in the home that is included in the Trust. Ms. Johnson entirely thwarted the intentions of her parents in establishing the trust for her brother to receive half the estate. Ms. Johnson dishonored the trust her father placed in her when he named her as the sole person responsible for distribution of the trust. Ms. Johnson acted inappropriately in bestowing the proceeds of the trust upon herself and not share one cent with her brother.

Ms. Johnson egregiously wronged her brother during his lifetime. Now she wishes to continue wronging her brother after his death by not only keeping the assets that were intended for Mr. Cornell, but also raiding his estate for her attorney fees. Certainly, this is not the result that the parents of Mr. Cornell and Ms. Johnson intended when they created the trust.

The law of abatement is an unsettled area of law. The issue of abatement only arose after Mr. Cornell filed his action against Ms. Johnson for her mismanagement of the estate. Although the arguments of Mr. Cornell and his estate were rejected, the arguments were soundly based. The inequitable conduct of Ms. Johnson justified the vigorous arguments made on behalf of Mr. Cornell. I, therefore, reject Ms. Johnson's request for attorney fees from the Estate of John H. Cornell.

Ms. Johnson also requests that she be awarded \$277.15 for the costs of obtaining a copy of her deposition. Ms. Johnson asserts she is entitled to the award as

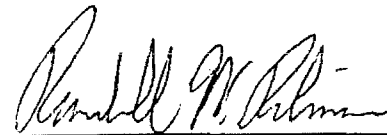
a prevailing party pursuant to Idaho Rule of Civil Procedure 54(d)(1)(C)(10). Rule 54(d)(1) provides, "Except when otherwise limited by these rules, costs shall be allowed as a matter of right of the prevailing party or parties *unless otherwise ordered by the court.*" (emphasis added). Rule 54(d)(1)(C)(10) relied upon by Ms. Johnson provides, "*When costs are awarded to a party*, such party shall be entitled to the following costs, actually paid, as a matter of right: ... (10) Charges for one (1) copy of any deposition taken by any of the parties to the action in preparation for trial of the action." (emphasis added).

The decision whether to grant costs is a matter of discretion. It would be inequitable to award Ms. Johnson her costs for the same reason it is inequitable to award her attorney fees from the Estate of John H. Cornell.

#### CONCLUSION

Toni Johnson's request for an award of attorney fees and the cost of a deposition from the estate of John H. Cornell is denied for the reasons set forth above.

Dated this 6th day of September, 2013.



Randall W Robinson, Magistrate



## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Judgment of Dismissal was mailed postage pre-paid, on the 9<sup>th</sup> day of September, 2013, to:

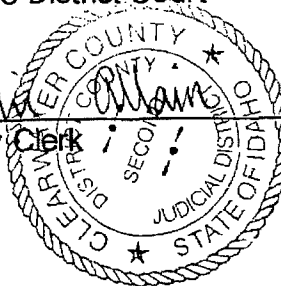
Samuel Creason  
Creason, Moore, Dokken & Geidl  
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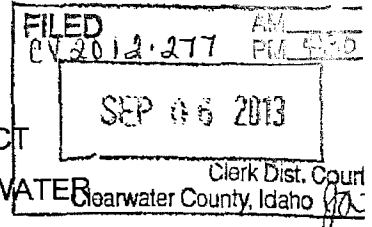
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Aherin, Rice & Anegon  
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Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: [Signature]  
Deputy Clerk





IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

ORDER RE ATTORNEY  
FEES AND COSTS

Based upon Findings of Fact and Conclusions of Law as set forth in the  
Memorandum Opinion Re Attorney Fees and Costs, the Memorandum of Costs and  
Attorney Fees filed on July 5, 2013 is HEREBY DENIED.

Dated this 6th day of September, 2013.

  
Randall W Robinson, Magistrate

ORDER RE ATTORNEY FEES-1  
AND COSTS

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Order Re Attorney Fees and Costs was mailed postage pre-paid, on the 9<sup>th</sup> day of September, 2013, to:

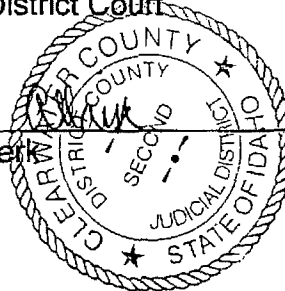
Samuel Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

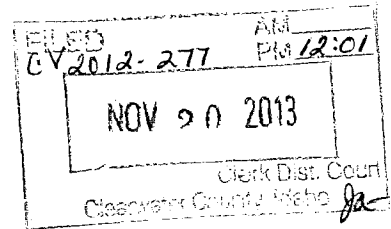
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Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: Jodie [Signature]  
Deputy Clerk





**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. ) Case No. CV 2012-00277  
CORNELL. )

**RESPONDENT'S BRIEF**

---

Appeal from the Magistrate Division of the District Court  
of the Second Judicial District for Clearwater County

---

Honorable Randall W. Robinson, Magistrate Judge Presiding

Counsel for Appellant

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Samuel T. Creason, ISB #8183  
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Lewiston, ID 83501  
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**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of: )  
 )  
THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. ) Case No. CV 2012-00277  
CORNELL. )

**RESPONDENT'S BRIEF**

---

Appeal from the Magistrate Division of the District Court  
of the Second Judicial District for Clearwater County

---

Honorable Randall W. Robinson, Magistrate Judge Presiding

Counsel for Appellant

Theodore O. Creason, ISB #1563  
Samuel T. Creason, ISB #8183  
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## I. STATEMENT OF CASE

### A. NATURE OF THE CASE

This action involves a dispute over the administration of a trust. One of the trust beneficiaries, John Cornell, filed a petition seeking relief against his sister in her capacity as trustee of the subject trust. Shortly thereafter, Mr. Cornell died. His Petition was dismissed after Mr. Cornell's death. Subsequently, his estate filed a separate petition raising claims related to the trust administration. The Magistrate Court dismissed the Estate's petition. The Estate now appeals. The question before the Court is whether Mr. Cornell's death abates the Estate's claims related to the trust.

### B. COURSE OF PROCEEDINGS AND FACTUAL BACKGROUND

Given the highly unusual posture of this proceeding, the factual background and course of the proceedings overlap to such a degree that it is appropriate to discuss both together.

#### Background

Michael S. Cornell and Arlie M. Cornell established the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell on November 1, 1996. *Petition for Supervised Administration and Court Ordered Distribution of Trust* at ¶¶ 3.1, 3.4, Exh. A (said Exhibit hereinafter referred to as "Trust"). Through said Trust, Mr. and Mrs. Cornell named their two children, Toni C. Johnson and John H. Cornell, as the beneficiaries of the trust upon Mr. and Mrs. Cornell's deaths. *Id.* at § 4.03 of Exh. A. On August 6, 2009, Michael S. Cornell as surviving grantor and trustee named Toni C. Johnson as sole trustee/successor trustee. *Id.* at Exh. B.

Arlie M. Cornell died on November 9, 2008 and Michael S. Cornell died on December 15, 2009. *Id.* at ¶¶ 3.4, 3.6.



Litigation Concerning Cornell Revocable Living Trust

On July 11, 2012, John H. Cornell filed a *Petition for Supervised Administration and Removal of Trustee*, which originally initiated this proceeding. *Id.* at ¶¶ 2.3, 3.9.

John H. Cornell died on or around August 20, 2011 leaving no issue. *Id.* at ¶ 3.10.

Respondent Toni C. Johnson filed a *Motion to Dismiss* on September 17, 2012 seeking to dismiss the *Petition for Supervised Administration and Removal of Trustee* on the basis that the claims of John H. Cornell were extinguished by his death.

Briefing in support of and in opposition to dismissal was submitted by Respondent through counsel and Mr. Aherin for John Henry Cornell (and presumably for Margaret Watkins who as of November 15, 2012 served as temporary personal representative of the Estate of John Henry Cornell). *Memorandum of Law* filed November 1, 2012; *Response to Respondent's Motion to Dismiss* filed November 15, 2012; *Respondent's Reply Brief in Support of Motion to Dismiss* filed November 20, 2012. Said Motion was first called for hearing on November 27, 2012, at which time it was continued to allow participation by Kareen Cornell.

Said Motion was called for hearing for a second time on January 8, 2013, at which time Respondent through counsel and Mr. Aherin on behalf of John Henry Cornell (and presumably Margaret Watkins who at that time served as temporary personal representative of the Estate of John Henry Cornell) presented oral argument. Mr. Creason did not participate at that hearing on Kareen Cornell's behalf due to what was later discovered to be a misunderstanding.

Subsequent briefing in support of and in opposition to dismissal was submitted by Ms. Seubert for Respondent and Mr. Creason for Kareen Cornell. *Memorandum re: Respondent's Motion to Dismiss* filed January 18, 2013; *Respondent's Brief in Reply to Brief of Surviving Spouse* filed February 4, 2013.

Said Motion was called for hearing for a third time on February 6, 2013, at which Ms. Seubert for Respondent, Mr. Aherin for John Henry Cornell (and at that time Margaret Watkins as temporary personal representative of the Estate of John Henry Cornell), and Mr. Creason for Kareen Cornell presented oral argument.

After considering the above-referenced briefing and oral argument presented, this Court issued an oral ruling in open court on February 12, 2013 dismissing the *Petition for Supervised Administration and Removal of Trustee* and granted the Estate twenty days in which to raise any claims of the Estate. A written opinion and judgment followed. *Id.* at ¶ 3.11; *Memorandum Opinion and Judgment for Dismissal* entered February 15, 2013.

Margaret Watkins, as a self-identified “interested person,” has appealed said *Memorandum Opinion and Judgment for Dismissal*. Said appeal remains pending before this Court and the Court has indicated that oral argument on Ms. Watkins’ appeal and the Estate’s appeal will be scheduled concurrently.

On February 26, 2013, Kareen Cornell as then personal representative of the Estate of John H. Cornell and as his surviving spouse, filed a *Petition for Supervised Administration and Court Ordered Distribution*.

On March 4, 2013, Respondent filed a *Motion to Dismiss*. Briefing in support of and in opposition to dismissal was submitted by counsel for Respondent and Mrs. Cornell. Oral argument was presented on June 4, 2013. The Magistrate Court issued its

*Estate of John H. Cornell, deceased*

John H. Cornell died on or around August 20, 2011 leaving no issue. *Id.* at ¶ 3.10.

On November 15, 2012, in the probate action concerning the Estate of John H. Cornell, deceased, Margaret Watkins was appointed as Temporary Personal Representative of the Estate

of John H. Cornell, deceased. See *Order of Appointment of Temporary Personal Representative*, Clearwater County Case No. CV 2012-00439.

On February 12, 2013, in the probate action concerning the Estate of John H. Cornell, deceased, Kareen Cornell was appointed as personal representative of the Estate of John H. Cornell, deceased, thereby terminating the prior temporary appointment of Margaret Watkins. See *Order Appointing Personal Representative, Letters of Testamentary*, Clearwater County Case No. CV 2012-00439.

## II. ARGUMENT

### A. The Estate's claims against Respondent abated upon the death of John Cornell based upon the application of Idaho Code § 5-327(2).

The Estate asserts that the Magistrate Court erred in dismissal of its tort claims in its application of *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012), to this case. *Appellant's Brief* at 6-9. The Magistrate Court relied upon the *Bishop* decision to conclude that the general rule requires that claims sounding in tort do not survive the claimant's death. *Memorandum Opinion re: Kareen Cornell* at 9-12.

The Idaho Supreme Court has discussed Idaho abatement law as follows:

The abatement rule holds that in the absence of a legislative enactment addressing the survivability of a claim, the common law rules govern. Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate.

... The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained. Breach of an attorney's duty is negligence in tort. The contract basis of legal malpractice actions is the failure to perform obligations specified in the written contract. Thus, under the abatement rule, breach of duty is an action in tort, not contract; that is, unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney. Breach of that duty is a tort.

... [T]he contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct. If an attorney and client

want to provide for a higher standard of care, they may do so by express language in the contract. Here, the standard of care in the contract is essentially the same as in any attorney-client relationship. Because this claim sounds in tort, it abated upon [the client's] death.

*Bishop v. Owens*, 152 Idaho 616, 620-21, 272 P.3d 1247, 1251-52 (2012) (citations omitted).

Similar to the attorney-client relationship at issue in *Bishop*, the contours of the duties owed by a trustee to trust beneficiaries are defined by the Uniform Probate Code and Principal and Income Act. Here, the Trust contains no greater requirements than are set forth in said statutes. Therefore, the common law rule of abatement applies.

Because a breach of fiduciary duty arises in tort, it abates upon the injured person's death under the common law. As such, the Estate's breach of fiduciary duty claim is abated unless a statute precludes dismissal.

The statutory section that governs the survivability of negligence claims is Idaho Code Section 5-327(2), which was amended in 2010 with the amendment taking effect on July 1, 2010. The Magistrate Court correctly concluded that the Estate's claims are outside of the scope of Idaho Code Section 5-327(2). See *infra* § II(H).

As such, the Estate's negligence claims are abated by John H. Cornell's death and no reversible error has been shown. The Magistrate Court's dismissal should be affirmed.

B. There is no exception to the abatement rule for torts for injury to property.

The Estate argues that the Magistrate Court erred when it rejected its argument that an exception to the general rule of abatement exists where damages are sought for injury to property. *Appellant's Brief* at 9. This issue was raised below and addressed by in the Magistrate Court's decision as follows:

Kareen seeks to distinguish *Bishop* by relying on several Am. Jur. Cites. Kareen argues that the survival of an action depends on the nature of the interest affected. Because property of the Trust is involved, as opposed to physical injury, the claim cannot be abated. 1 Am.Jur. 2d *Abatement, Survival and Revival* § 51. ...

While Kareen correctly sets forth these principles, she provides no explanation as to how they are consistent with *Bishop*. The Supreme Court in *Bishop* did not examine whether the claims were equitable or torts done to persons or to property in determining whether the joint contract and tort action survives the death of the party. ... As Kareen's claims are in the nature of torts, Kareen's claims are abated by John's death. Therefore, Kareen's arguments are rejected.

*Memorandum Opinion re: Kareen Cornell* at 15-16.

The Estate argues that the purported exception to the general abatement rule for cases for injury to property is “[o]ne of the well-recognized exceptions” under Idaho law. *Appellant’s Brief* at 9. In support of this “well-recognized exception,” Mrs. Cornell cites to the Idaho cases of *Barnes v. Barnes*, 135 Idaho 103, 15 P.3d 816 (2000), and *First Sec. Bank of Idaho, Nat. Assn’n v. Rogers*, 91 Idaho 654, 429 P.2d 386 (1967). See *Appellant’s Brief* at 9, 10. Said cases do not stand for the proposition that such an exception has been recognized under Idaho law.

The *Barnes* case was a divorce action where the husband died during the pendency of an appeal after entry of an interlocutory divorce. There, the surviving wife sought to “posthumously reunite the parties based on a procedural flaw in the motion for summary judgment.” *Id.* at 107, 15 P.3d at 820. The *Barnes* decision stands for the limited principle that where a divorced spouse dies prior to resolution of the division of community property and debts, the resolution of said division of property survives. *Id.* Said case does not discuss nor recognize any exception to the abatement rule outside of a divorce proceeding.

The *Rogers* case was an interpleader action where a dispute arose between three creditors over funds related to a contract dispute. 91 Idaho at 655, 429 P.2d at 387. The quote relied upon by Appellant, “equity regards that as done which ought to be done,” was part of a discussion of the doctrine of equitable conversion. 91 Idaho at 657, 429 P.2d at 389; *Appellant’s Brief* at 10. Said case does not discuss nor recognize any exception to the abatement rule.

A review of Idaho case law finds no other cases that recognize or create an exception to the general abatement rule discussed in *Bishop v. Owens*. See *infra* II(A).

For these reasons, no reversible error has been shown, and the Magistrate Court’s dismissal should be affirmed.

C. There is no exception to the abatement rule for claims based upon a remedial statute.

The Estate argues that the Magistrate Court erred when it rejected its argument that an exception to the general rule of abatement exists where damages are sought upon a remedial statute. *Appellant's Brief* at 11. This issue was raised below and addressed by in the Magistrate Court's decision as follows:

Kareen seeks to distinguish *Bishop* by relying on several Am. Jur. Cites. ... Kareen also argues that the claims under the Probate Code survive because "(a) cause of action that is founded on a remedial statute survives the death of the party possessing the cause of action." 1 Am.Jur. 2d *Abatement, Survival, and Revival* § 59.

While Kareen correctly sets forth these principles, she provides no explanation as to how they are consistent with *Bishop*. The Supreme Court in *Bishop* did not examine whether the claims were equitable or torts done to persons or to property in determining whether the joint contract and tort action survives the death of the party. Nor did the Supreme Court analyze whether the rules of professional conduct are remedial in nature for purposes of surviving the party's death. As Kareen's claims are in the nature of torts, Kareen's claims are abated by John's death. Therefore, Kareen's arguments are rejected.

*Memorandum Opinion re: Kareen Cornell* at 15-16.

Appellant cites to no case law or statutory authority in support of her position, but instead relies upon a treatise, 1 Am. Jur. 2d *Abatement, Survival and Revival* § 59, without further authority or relationship to Idaho law.

For these reasons, no reversible error has been shown, and the Magistrate Court's dismissal should be affirmed.

D. The Magistrate Court correctly considered and applied the law in rejecting the Estate's conversion claim.

The Estate seeks recovery under the equitable doctrine of conversion. *Appellant's Brief* at 12-13. The Magistrate Court rejected the Estate's conversion claim concluding that the conversion claim are in the nature of torts, thus abated by Mr. Cornell's death. *Memorandum Opinion re: Kareen Cornell* at 15-16.

Appellant cites to no case law or statutory authority in support of her position, but instead relies upon a treatise, 1 Am. Jur. 2d *Abatement, Survival and Revival* § 59, without further authority or relationship to Idaho law.

For these reasons, no reversible error has been shown, and the Magistrate Court's dismissal should be affirmed.

E. The Magistrate Court correctly considered and applied the law in rejecting the Estate's constructive trust claim.

The Estate seeks recovery under the equitable doctrine of constructive trust. *Appellant's Brief* at 13-14. The Magistrate Court rejected the Estate's constructive trust claim concluding that the Idaho Probate Code supplants equitable considerations and that the circumstances necessitating creation of a constructive trust meets the definition of a tort. *Memorandum Opinion re: Kareen Cornell* at 12-13.

"A constructive trust arises where legal title to property has been obtained through actual fraud, misrepresentations, concealments, taking advantage of one's necessities, or under circumstances otherwise rendering it unconscionable for the holder of legal title to retain beneficial interest in the property." *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986) (citing *Davenport v. Burke*, 30 Idaho 559, 167 P. 481 (1917)). A "constructive trust arises from the legal title holder's wrongful actions and not from any intent to create a trust." *Snider v. Arnold*, 153 Idaho 641, 289 P.3d 43 (2012) (citing *Davenport v. Burke*, 30 Idaho 599, 608, 167 P. 481, 483 (1917)).

The Magistrate Court concluded that the Estate's constructive trust claim is a tort. *Memorandum Opinion re: Kareen Cornell* at 12 (citing *Bishop v. Owens*, 152 Idaho 616, 619-20, 272 P.3d 1247, 1249-50 (2012)) ("Kareen requests a constructive trust to address the civil

wrong, the breach of duties Toni owed to John. As a cause of action sounding clearly in tort, Kareen's request for a constructive trust must be rejected as abated.").

The Estate asserts that the Idaho decision of *Brasch v. Brasch*, 55 Idaho 777, 47 P.2d 676 (1935) holds that the survival of constructive trust claims is presumed. The *Brasch* case involved a dispute over whether a statute of limitations had run prior to a decedent's death. *Id.* The Court concluded that the statute of limitations for the disputed claim had run during the decedent's lifetime, therefore the plaintiff's demand was barred by the statute of limitations. *Id.* at 780, 47 P.2d at 679. The case discussed the probate statute then in effect, which read: "If a person entitled to bring an action die before the expiration of the term limited for the commencement thereof, *and the cause of action survive*, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death[.]" *Id.* at 679, 47 P.2d at 678 (I.C. A., sec. 5-231) (emphasis added). The statute in question recognizes the question of abatement by conditioning the tolling of a statute of limitations only where "the cause of action survive[s]." It does not recognize a presumption, instead a condition precedent.

The Estate argues that "Ms. Johnson ought to have distributed the Trust res as soon as reasonably practicable when the Trust automatically terminated upon the death of Michael Cornell. Ms. Johnson acted inequitably by retaining the Trust res in the name of the Trust, while using it for her own benefit." As the Magistrate Court previously concluded in its *Memorandum Opinion* dated February 15, 2013, "[t]he constructive trust argument is indistinguishable from [the Estate's] arguments regarding breaches of fiduciary duties."

The Estate has provided no authority or explanation to explain the distinction it is asserting, nor to show reversible error in rejecting its constructive trust claim. Therefore, the Magistrate Court's dismissal should be affirmed.



F. The Magistrate Court correctly considered and applied the law in rejecting the Estate's unjust enrichment claim.

The Estate seeks recovery under the equitable doctrine of unjust enrichment. *Appellant's Brief* at 15. The Magistrate Court rejected the Estate's unjust enrichment claim concluding that the unjust enrichment claim is in the nature of torts, thus abated by Mr. Cornell's death. *Memorandum Opinion re: Kareen Cornell* at 15-16.

"Unjust enrichment, as a fictional promise or obligation implied by law, allows recovery where the defendant has received a benefit from the plaintiff that would be inequitable for the defendant to retain without compensating the plaintiff for the value of the benefit." *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 123 Idaho 754, 767, 979 P.2d 627, 640 (1999) (citing *Continental Forest Products, Inc. v. Chandler Supply Co.*, 95 Idaho 739, 743, 518 P.2d 1012, 1205 (1974)). Unjust enrichment claims involve claims based on an implicit promise to pay. *Id.*, 979 P.2d at 640.

As with the conversion and constructive trust claim, Appellant cites to no controlling authority to support its assertion the *Bishop* abatement rule does not apply to claims arising in equity. *Appellant's Brief* at 15. Further, Appellant provides no explanation of how the Magistrate Court erred in its conclusion that "[a]s Kareen's claims are in the nature of torts, Kareen's claims are abated by John's death." *Memorandum Opinion re: Kareen Cornell* at 16.

For these reasons, no reversible error has been shown, and the Magistrate Court's dismissal should be affirmed.

G. The Magistrate Court correctly considered and applied the law in rejecting the Estate's breach of contract claim.

The Estate argues that the Magistrate Court erred by relying upon *Bishop* "to re-characterize the Estate's contract claims[.]" *Appellant's Brief* at 15-16.

The Magistrate Court discussed the Estate's breach of contract claim as follows:

Kareen argues that her breach of contract claim must be viewed as separate from the breach of fiduciary claim and, as a contract claim, survives John's death. The Supreme Court in *Bishop* addressed the same claim. In the absence of finding that a higher duty of care is provided for under the Trust agreement than provided under the statute, *Bishop* requires abatement of Kareen's claim. *Bishop v. Owens*, 152 Idaho at 620, 272 P.3d at 1251. Kareen fails to point out any way in which the Trust instrument imposes any duties upon Toni that are not also imposed by the Probate Code. This Court stands by its more detailed analysis when addressing John's claims that the Trust instrument gives no higher duty of care than the duty imposed by the Probate Code. *Memorandum Op.* Feb. 15, 2013 at 6-8.

*Memorandum Opinion re: Kareen Cornell* at 13-14. In the earlier opinion referenced therein, the Magistrate Court discussed the *Bishop* decision to conclude that like *Bishop*, this case is a mixed tort and contract case involving torts arising from a contractual agreement. *Memorandum Opinion* Feb. 15, 2013 at 6. The Magistrate Court further concluded that the duties owed by the trustee to a beneficiary are defined by the Uniform Probate Code and Uniform Principal and Income Act. *Id.* at 7. Violation of these fiduciary duties arising under statute is a tort, not a contract. *Id.*

Specifically, the *Bishop* Court analyzed the interplay of tort and contract theories in the attorney-client context as follows:

[T]he contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct. If an attorney and client want to provide for a higher standard of care, they may do so by express language in the contract. Here, the standard of care in the contract is essentially the same as in any attorney-client relationship. Because this claim sounds in tort, it abated upon Patricia Shelton's death.

...

Although the medical malpractice cases on which Owens relies are governed by specific statute, the fact that a proponent labels his or her action as sounding in contract as well as malpractice does not make the underlying action contract. The "theory" of relief sought is not different. A holding to the contrary would create a per se breach of contract action in every legal malpractice action. Legal malpractice has traditionally been treated as the proper claim where an attorney breaches his or her duty, which arises from the attorney-client relationship.

As noted in the previous section, because the contingent fee agreement in this matter contained no express language providing for a higher standard of care, the duty owed by Owens is not defined by the contingent fee agreement. The language in the contingent fee agreement that "attorneys shall represent Client in

said manner and do all things necessary, appropriate, or advisable, in regard thereto” is not materially different from the standard applied in the legal malpractice claim. Thus, this action is really a malpractice claim disguised as a contract claim. A person cannot change a tort action into a contract action simply by labeling it as such. *Hayward*, 136 Idaho at 350, 33 P.3d at 824.

*Bishop v. Owens*, 152 Idaho 616, 620-21, 272 P.3d 1247, 1251-52 (2012)).

Here, like in *Bishop*, Appellant’s breach of contract claim is really a breach of fiduciary duty claim disguised or labelled as a contract claim. The subject trust contained no provisions providing for a higher standard of care than established in the Uniform Probate Code.

Appellant cites to no authority to support its assertions that “a breach of contract claim is distinct from a breach of fiduciary duty claim.” *Appellant’s Brief* at 17. Appellant further asserts that “[t]o argue that no contractual claim may lie against the trustee is to is to argue that the terms of the trust document have no substance.” *Id.* at 18. The trust document has substance, but it is the same substance as found in statute. As such, the Estate’s breach of contract claim abates.

For these reasons, no reversible error has been shown, and the Magistrate Court’s dismissal of the Estate’s breach of contract claim should be affirmed.

H. The Magistrate Court correctly considered and applied I.C. § 5-327(2)

The Estate argues that the Magistrate Court erred in its interpretation of Idaho Code Section 5-327(2). *Appellant’s Brief* at 18-20. The Estate contends that “the court’s error was the result of construing the language of the statute in such a rigid manner as to produce an absurd result upon application.” *Id.* at 18.

It is important to note that said statutory section was amended in 2010, where the Estate’s claims cover a time period relating back to December 15, 2009, which is the death of the last grantor’s death. In light of said amendment, a two-part analysis is needed to properly consider the Estate’s claims.

Prior to its amendment, which took effect on July 1, 2010, said statute read as follows:

Causes of action arising out of injury to the person or property, or death, caused by the wrongful act or negligence of another, except actions for slander or libel, shall not abate upon the *death of the wrongdoer*, and each injured person or the personal representative of each one meeting death, as above stated, shall have a cause of action against the personal representative of the wrongdoer; provided, however, the punitive damages or exemplary damages shall not be awarded nor penalties adjudged in any such action; provided, however, that the injured person

shall not recover judgment except upon some competent, satisfactory evidence corroborating the testimony of said injured person regarding negligence and proximate cause.

I.C. § 5-327 (through July 1, 2010) (emphasis added).

In its prior form, the clear language of the statute reflects that survivability applied only after the death of the wrongdoer, not the death of the injured party as the subsequent amendment addressed. Because the amendment to Idaho Code Section 5-327(2) was not retroactive, said amendment applied only to actions which arose on or after the statute's effective date. *See Bishop*, 152 Idaho at 620, 272 P.3d at 1251. Therefore, the statute in its original form applies from the death of Michael S. Cornell on December 15, 2009 until July 1, 2010. The Estate's predecessor in interest, John Cornell, is the injured party and Toni Johnson the wrongdoer for purposes of this appeal. Because the alleged "injured party" is the decedent as opposed to the "wrongdoer," any claims of John Cornell that may have arisen between December 15, 2009 and July 1, 2010 abated upon his death. No reversible error has been shown, and the Magistrate Court's dismissal as it relates to claims arising prior to July 1, 2010 should be affirmed.

The Estate's parsing of the current statute applies only to its claims that arose on or after July 1, 2010. In its current form, Idaho Code § 5-327(2) states in relevant part as follows:

A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person as a result of the wrongful act or negligence.

The Estate argues that the limitation on recovery for medical expenses, other out-of-pocket expenses, and loss of earnings applies only to personal injury cases, not cases involving property damages. *Appellant's Brief* at 18-20. Said interpretation does not employ the well-recognized principles of statutory interpretation cited to by Appellant. *See Appellant's Brief* at 19 (citing *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011); *Smith v. Dept. of Employment*,

100 Idaho 520, 522, 602 P.2d 18, 20 (1979)). Specifically, Appellant cites to no legislative history that would support her conclusion. Appellant parses the second sentence of said statute in an attempt to limit the statute's application to personal injury cases, thereby ignoring the context of the entire document, which is clearly applicable to "a cause of action for personal injury **or property damage**." (emphasis added). Appellant's interpretation relies upon speculation and generalities (specifically that "medical expenses" rarely, in his opinion, are incurred in property damage cases), in order to deviate from the plain and ordinary meaning of "such action." Further, said limited interpretation, which rejects its application to property damages cases despite their specific inclusion by reference, departs from common sense and reading. The Estate cites to no case law supporting this interpretation of the statute. For these reasons, no reversible error has been shown and the Magistrate Court's application of Idaho Code 5-327(2) should be affirmed.

### III. CONCLUSION

For these reasons, Respondent respectfully requests that this Court affirm the *Judgment for Dismissal* and *Memorandum Opinion re: Kareen Cornell*, both entered June 21, 2013.

DATED this 19th day of November, 2013.

**JONES, BROWER & CALLERY, P.L.L.C.**

  
KARIN SEUBERT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing *RESPONDENT'S BRIEF* was, this 19 day of November, 2013,

☒ hand-delivered;  
☐ mailed, postage pre-paid,  
by first-class mail; or  
☐ transmitted via facsimile

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KARIN SEUBERT

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

✓ CASE NO CV 2012-277

BY *Gf* DEPUTY

In the Matter of:

Case No. CV 2012-00277

THE REVOCABLE FAMILY TRUST  
OF MICHAEL S. CORNELL AND  
ARLIE M. CORNELL.

Appeal from the Magistrate Division of the District Court  
of the Second Judicial District for Clearwater County

Honorable Randall W. Robinson, Magistrate Judge Presiding

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## PRELIMINARY STATEMENT

This Court must determine whether, through the doctrine of abatement, Toni C. Johnson can avoid repayment of her brother's estate, the Estate of John Cornell, for property losses from admittedly improper conduct.

Johnson's arguments regarding common law abatement are based upon an expansive interpretation of a single sentence in *Bishop v. Owens*, 152 Idaho 616, 619 (2012). Johnson proposes an interpretation which would dictate that all claims which are torts—or which could be re-characterized as torts—abate upon the death of the injured party, absent a statutory exception. Johnson's interpretation conflicts with pre-*Bishop* and post-*Bishop* precedent, as well as the language and facts from *Bishop*, itself. The Court should reject Johnson's proposed interpretation of *Bishop*. Without Johnson's proposed universal rule of abatement, the Court must determine whether the Estate's claims fall within one of the exceptions to the general rule that tort claims abate. The Estate's claims fall within three such exceptions: the exception for claims seeking redress for injury to property; the exception for claims founded upon a remedial statute; and the exception for claims that are not legal claims, but claims in equity.

Johnson's arguments regarding the Estate's breach of contract claims proposes a legal analysis whereby the court must re-characterize every breach of contract claim into a tort claim if the contract does not provide for a higher standard of care than established at law. Johnson's analysis should be rejected, as it would create an unsubstantiated and unworkable standard which would, in practical effect, eliminate nearly all breach of contract claims.

Finally, Johnson's argument regarding statutory abatement under Idaho Code § 5-327(2) sets forth a proposed interpretation which conflicts with the intent of the legislature, as determined by the language of the statute, common sense, and reason.

The Estate requests that this honorable Court reverse the judgment of the magistrate court.

### ARGUMENT

#### A. The Estate's Tort Claims Did Not Abate at Common Law.

Johnson argues that *Bishop* established the following universal statements as a rule of law: *All claims which can be characterized as a tort claim abate at common law unless a statutory exception exists. See Resp. Br. 5, ¶2.* Johnson's proposed rule of abatement would prohibit the Estate from pursuing its claims against her for the property she wrongfully withheld from her brother. Johnson's interpretation stretches *Bishop* far beyond the scope of its facts and far beyond the Idaho Supreme Court's treatment of *Bishop* earlier this year in *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 293 P.3d 661 (2013).<sup>1</sup> In *Luciani*, the Court made clear that *Bishop* did not establish a universal statement of law, but rather re-iterated what had long been the rule at common law in Idaho: exceptions exist to the *general rule* that tort claims abate. *See id.* at 667.

The *Bishop* Opinion included a statement that "[u]nder the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort

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<sup>1</sup> Because *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani* has not yet been published in the Idaho Reporter, all pinpoint citations are made to the Pacific Reporter.

abate.” 152 Idaho 616, 619, 272 P.3d 1247, 1250 (2012). As set forth in the Estate’s Opening Brief, Johnson’s interpretation of this sentence is erroneous. *See App. Br.*, 7-9. Johnson’s interpretation conflicts with (a) the language of the *Bishop* Opinion; (b) the *Bishop* Court’s citation to *Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919) as authority; and (c) the post-*Bishop* authority of *Luciani*.

The question before the *Luciani* Court was whether a legal malpractice claim could be assigned as part of an asset and liability transfer from one entity to another. *Id.* at 663. The Court’s consideration of assignability included a discussion of its precedent on survival in *Bishop*. *Id.* The issue of survival was raised by the defendants in *Luciani*, likely because “[t]he assignability of a cause of action is . . . intimately associated with, and in most cases held to depend upon, the same principle as the survival of a cause of action. Thus, if it survives, it may be assigned; if not, it may not.” *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254, 257 (1926). The *Luciani* defendants argued that *Bishop* stood for the proposition that all legal malpractice claims abated at common law—just as Johnson argues here—and, therefore, that such claims are unassignable. *Luciani*, 293 P.3d at 667. The Court rejected this reasoning.

The Supreme Court first made clear that *Bishop* did not stand for the proposition that all legal malpractice claims sounded in pure tort. *Id.* The Court then made clear that *Bishop* did not stand for the proposition that every tort claim abated at common law.

The malpractice claim here sounds in tort and, therefore, the *MacLeod* case provides some guidance. Although we stated that “if [a tort claim] survives, it may be assigned; if not, it may not,” we also held that an “injury [that] lessens the estate of the injured party does survive, and that it is assignable.” 43 Idaho at 75, 249 P. at 257. If personal injury claims that “diminish the estate [and are] an

injury to property” may be assigned, it seems clear that personal injuries of the type alleged here—malpractice leading to an alleged loss of millions of dollars—are precisely that. *See id.* The crux of St. Luke’s lawsuit against Luciani is that the alleged malpractice substantially impacted the value of the assets it acquired from Magic Valley.

*Id.* (quoting *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254, 257 (1926)) (alterations in original).

Thus, the *MacLeod* Opinion is still good law in this jurisdiction with respect to the intimately associated issues of assignability and survival.

Having established that the *Bishop* Opinion did not create a universal rule of abatement, the question before this Court is whether the Estate’s claims fall within any of the “well-recognized exceptions” to the general rule that tort claims abate. *See Kloepper*, 32 Idaho 415, 184 P. 477. The Estate’s Opening Brief shows that its claims fall within three well-recognized exceptions: (1) the exception for claims seeking redress for injury to property, *see App. Br.* 9-11; (2) the exception for claims founded upon a remedial statute, *see App. Br.* 11; and (3) the exception for claims that are not legal claims, but claims in equity, *see App. Br.* 12-14.

(1) Tort claims seeking redress for injury to property are an exception to the general rule of abatement.

The exception to abatement for claims seeking redress for injury to property is an expressly identified exception in *Luciani*. 293 P.3d at 667 (“[an] injury that lessens the estate of the injured party does survive”). In her brief, Johnson does not provide analysis of the *Luciani* Opinion; instead, she argues that two other cited cases are inapposite. *See Resp. Br.* 6 (disputing applicability of *Barnes v. Barnes*, 135 Idaho 103, 105, 15 P.3d 816, 818 (2000) & *First Sec. Bank of Idaho, Nat. Ass’n v. Rogers*, 91 Idaho 654, 657, 429 P.2d 386, 389 (1967)).

The Estate directs this Court to *Barnes* as merely one example of Idaho courts' treatment of a decedent's claims regarding property interests upon the decedent's death. Those claims do not abate. The Estate directs this Court to *Rogers* as authority for the finding that, at the very least, a genuine issue of material fact exists regarding whether John Cornell held a vested property interest in the Trust res at the time of his death. By conceding inequitable conduct, Johnson has conceded that John Cornell held an interest at the date of death; she merely argues that her inequitable conduct succeeded in divesting him of that interest. Thus, Johnson has conceded those facts necessary for the Estate to pursue its claim at trial.

The cases of *Barnes* and *Rogers* provide exemplary support for that which is explicitly stated in *Luciani*, *MacLeod*, and *Kloepfer*: an estate may pursue the claims of the decedent seeking redress for injury to property.

(2) Tort claims seeking redress based upon a remedial statute are an exception to the general rule of abatement.

Johnson's argument regarding this exception presumes that *Bishop* established a universal rule against survivability. Johnson then proposes an analysis whereby the Court must find abatement absent the provision of Idaho case law directly overcoming that universal rule. As set forth in the Estate's briefing, *Bishop* provides no such universal rule. Where no controlling authority exists, Idaho courts look to other jurisdictions and sources in determining whether an exception should be recognized in Idaho.<sup>2</sup> The second edition of American

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<sup>2</sup> See *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 293 P.3d 661 (2013) (looking to California, Nebraska, Indiana, Kansas, Virginia, Arizona, Florida, Illinois, Michigan, Minnesota, Rhode Island, Pennsylvania, Maine, ALR, and Am.Jur.2d); *MacLeod v. Stelle*, 43

Jurisprudence sets forth the general rules of law for United States' jurisdictions based upon a comprehensive review of case law. In fact, this same treatise was relied upon by the Idaho Supreme Court in *Luciani*. 293 P.3d at 665 & 666. The Estate maintains that the magistrate court's analysis was in error for the reasons set forth in the Estate's Opening brief.

(3) Tort claims based in equity and not in law do not abate.

With respect to the Estate's equitable claims, Johnson once again argues that this Court must find that the Estate's claims abated absent controlling case law expressly providing for an exception to the general rule in *Bishop*. This type of analysis runs contrary to the Idaho Supreme Court's consideration of other jurisdictions and authorities when analyzing issues of assignment and survival.<sup>3</sup> With respect to the Estate's arguments regarding the re-characterization of its equitable claims as legal claims, Johnson provides no argument or analysis additional to that set forth by the magistrate court. The Estate maintains that the magistrate court's analysis was in error for the reasons set forth in the Estate's Opening brief.

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Idaho 64, 249 P. 254, 255 (1926) (looking to California, New York, Wisconsin, Ohio, Kansas, Montana, Connecticut, Alabama, Colorado, and multiple secondary sources); *Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919) (looking to Virginia, Connecticut, Massachusetts, New York, Indiana, California, and *Corpus Juris*).

<sup>3</sup> Johnson challenges the Estate's citation to *Brasch v. Brasch*, 55 Idaho 777, 47 P.2d 676 (1935) as appearing to presume survival. The Estate provided this citation as a supplement to the general rule of survival of equitable claims, as set forth in the second edition of American Jurisprudence. The Estate still maintains that the *Brasch* Court appears to presume survival. In *Brasch*, the Court considered whether an estate could pursue a constructive trust claim on behalf of a decedent. *Id.* The *Brasch* Court held that the estate could not pursue the claims because the statute of limitations ran prior to institution of the suit. *Id.* The Court made no mention of abatement.

**B. The Estate's Complaint States Separate Contract Claims.**

Johnson proposes an interpretation of *Bishop* that not only created a universal rule of abatement, but that also dictates that all other claims—whether in tort or contract, whether in law or equity—ought to be re-characterized and held abated. The magistrate court erred in its interpretation. In its Opening Brief, the Estate distinguished its contract claims from those found in *Bishop* by setting forth the distinct factual scenarios, and identifying specific trust provisions that required certain duties not identified in the Uniform Probate Code. Johnson argues that even though the Estate has identified specific terms, it has still only made a tort claim because “no provisions [of the trust] provid[e] for a higher standard of care than established in the Uniform Probate Code.” *Resp. Br.* 12, ¶1.

Johnson reasons that where (1) the law presumes a standard of care, (2) the contract does not provide a distinct standard of care, and (3) the cause of action alleges a breach of that standard of care, then the claim is made in tort and not contract. If Johnson's proposed reasoning were to prevail, a contract cause of action would rarely exist. The law presumes a standard of care in every contract, whether it be a standard of good faith and fair dealing or a higher standard based upon the relationship of the parties. Johnson's attempt to distinguish contract claims from tort claims based upon the document's identification of a unique standard of care is unsubstantiated and unworkable.

**C. The Estate's Causes of Action Did Not Abate Under Idaho Code § 5-327(2).**

The Estate was unable to identify Idaho case law addressing the application of the language of Idaho Code § 5-327(2) to claims of property damage. The Estate recognizes that the



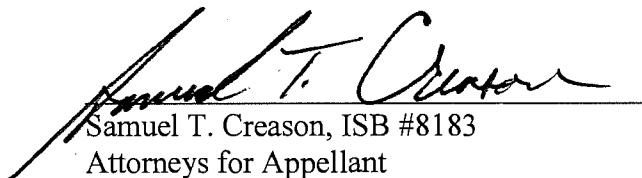
legislature's choice of arrangement and wording is inarticulate. The Court is left with the task of deriving the intent of the legislature. In accomplishing its task, the Court must determine if common sense and reason counsel a finding that the legislature intended to limit property damage cases to recovery for "medical expenses," "other out-of-pocket expenses" and "loss of earnings actually suffered" where those damages are incurred "prior to the death of such injured period as a result of the wrongful act or negligence." For the reasons set forth in the Estate's Opening brief, the Estate maintains that the legislature did not intend the second sentence to function as a limitation on property damage claims.

### CONCLUSION

The property interests of a decedent survive the decedent, they do not die and they do not abate. The magistrate court erred in its expansive reading of *Bishop* and erred in its rigid interpretation of Idaho Code § 5-327(2). The Estate asks this Court to reverse the grant of summary judgment.

DATED this 3rd day of December, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
Samuel T. Creason, ISB #8183  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that two copies of the foregoing REPLY BRIEF were served by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

  x    
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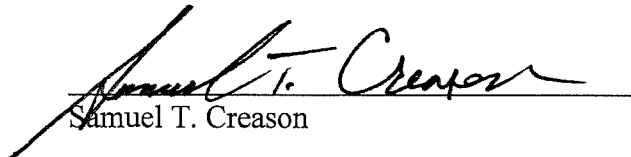
FIRST-CLASS MAIL  
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OVERNIGHT MAIL  
FAX TRANSMISSION

Darrel W. Aherin  
Aherin, Rice & Anegon  
1212 Idaho Street  
P. O. Drawer 698  
Lewiston, ID 83501

  x    
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HAND DELIVERED  
OVERNIGHT MAIL  
FAX TRANSMISSION

DATED this 3rd day of December, 2013.

  
\_\_\_\_\_  
Samuel T. Creason

FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2013 DEC 11 AM 11:29 ✓

CASE NO. CV2012-277

BY BP DEPUTY

Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
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Attorneys for Personal Representative  
Of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

)  
) Case No. CV 2012-00277  
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**NOTICE OF HEARING**

**RE: APPEAL**

Notice is hereby given that the undersigned will call on for hearing the Estate's Appeal on Tuesday, February 18, 2014, at 8:30 a.m., in the courtroom at the Clearwater County Courthouse, Orofino, Idaho.

DATED this 10<sup>th</sup> day of December, 2013.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
Samuel T. Creason, ISB # 8183  
Attorney for Petitioner Kareen Cornell

NOTICE OF HEARING - 1

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston ID 83501  
(208)743-1516; Fax(208)746-2231

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of December, 2013, a copy of the foregoing NOTICE OF HEARING RE: APPEAL was served by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, PLLP  
1304 Idaho Street  
P. O. Box 854  
Lewiston, Idaho 83501

☒ FIRST-CLASS MAIL  
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☐ OVERNIGHT MAIL  
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Darrel W. Aherin  
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☒ FIRST-CLASS MAIL  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ FAX TRANSMISSION

  
\_\_\_\_\_  
Samuel T. Creason, #8183

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF                    )  
MICHAEL S. CORNELL, et al,        )  
  )  
  )  
  )  
  )  
  )

CASE NO. CV2012-277

COURT MINUTES

Michael J. Griffin, District Judge Presiding  
Darrel Aherin, Attorney  
Karin Seubert, Attorney  
Theodore Creason, Attorney  
Christy L. Gering, Deputy Court Clerk  
Date: 02/18/2014 Tape: CD610-1 Time: 8:30 a.m.  
Subject of Proceeding: Oral Argument on Appeal

=====

MINUTE ENTRY:

- 8:30 Honorable Michael J. Griffin presiding telephonically. Court gives introductions. Parties present: Darrel Aherin, Attorney for; Karin Seubert, Attorney for; Theodore Creason, Attorney for. Court advises this is the time set for oral argument. Court apologizes and further advises it was his understanding this hearing would be telephonic, so he set matters in another county and will not be here in person. Court inquires if the Court Reporter is present. Clerk advises he is not.
- 8:30 In response to inquiry from the Court, Mr. Creason waives the Court Reporter.
- 8:30 In response to inquiry from the Court, Mr. Aherin waives the Court Reporter.
- 8:31 In response to inquiry from the Court, Ms. Seubert waives the Court Reporter.
- 8:31 Mr. Ted Creason advises he is covering for Sam Creason as his wife is giving birth right now. Mr. Creason gives argument.
- 8:35 Mr. Aherin gives argument.

Christy Gering  
Deputy Clerk

Court Minutes - 1

IN THE MATTER OF MICHAEL S. CORNELL  
CASE NO. CV2012-277

8:38 Ms. Seubert gives argument.

8:43 Court questions Ms. Seubert.

8:45 Ms. Seubert responds.

8:46 Mr. Creason gives rebuttal argument.

8:47 Mr. Aherin gives rebuttal argument.

8:48 Ms. Seubert gives rebuttal argument.

8:50 Court thanks counsel for their time and will get a decision out soon.

8:50 Court in recess.

Approved:   
Michael Griffin, District Judge



FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 APR -8 AM 9:41

CASE NO. CV 2012-277

BY CF DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF:


THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE  
M. CORNELL.

CASE NO. CV 2012-277

ORDER REMANDING CASE

This matter is remanded to the Magistrate Court for further proceedings consistent with this court's Order Re: Appeal filed contemporaneously.

Dated this 8 day of April, 2014.

  
Michael J. Griffin  
District Judge

CERTIFICATE OF MAILING

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that a copy of the foregoing was mailed to, faxed to, or delivered by me on the 8<sup>th</sup> day of April, 2014, to:

Darrel Aherin  
Aherin, Rice & Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

✓ U.S. Mail

Karin Seubert  
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P.O. Box 854  
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Theodore O. Creason  
Creason, Moore, Dokken & Geidl, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501

✓ U.S. Mail

Carrie Bird, Clerk of Court

By: C. Haring  
Deputy Clerk





FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 APR -8 AM 9:41

CASE NO. CV 2012-277

BY cf DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF:

)  
) CASE NO. CV 2012-277  
)

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE )  
M. CORNELL. )

) ORDER RE: APPEAL  
)

Michael S. Cornell and Arlie M. Cornell, husband and wife, created a trust (Cornell family trust) while living in California. They had two children, John Cornell and Toni Johnson, both of whom survived their parents.

Arlie and Michael Cornell were originally co-trustees of their family trust. Arlie Cornell died on November 9, 2008.

On August 6, 2009 Toni Johnson was appointed sole trustee of the Cornell family trust.

Michael Cornell died on December 15, 2009.

The trust provided that the trustee would divide the trust property equally between Toni Johnson and John Cornell as soon as reasonably possible after the death of both grantors. Toni Johnson did not distribute any of the trust property to John Cornell, but did use some of the trust property for her own benefit.

John Cornell filed a Petition for Supervised Administration of the Cornell family trust, and removal of Toni Johnson as trustee on July 11, 2012.

John Cornell died on August 20, 2012.

Margaret Watkins, a sister of Arlie Cornell, was appointed temporary personal representative of John Cornell's estate (Clearwater County Case #CV12-439) on November 13, 2012.

Kareen Cornell, wife of John Cornell, was appointed personal representative of John Cornell's estate on February 6, 2013. Margaret Watkins' appointment as personal representative was terminated on February 12, 2013.

The Magistrate issued a summary judgment on February 15, 2013. That order dismissed the petition for supervised administration of the Cornell family trust and petition for removal of the trustee (the petition had been filed by John Cornell and pursued by Margaret Watson).

Kareen Cornell, on behalf of her husband's estate, filed a petition for supervised administration of the Cornell family trust on February 26, 2013.

The Magistrate issued a summary judgment dismissing Kareen Cornell's petition on June 21, 2013.

Margaret Watson appealed the Magistrate's summary judgment on March 26, 2013.

On July 2, 2013 Kareen Cornell filed an appeal of the Magistrate's second summary judgment.

#### APPELLATE ISSUES

Does Margaret Watson have standing to appeal?

Does Kareen Cornell have standing to appeal?

Did the Magistrate err in dismissing the petition to remove Toni Johnson as trustee without addressing that issue?

Did the Magistrate err in determining that Toni Johnson's breach of fiduciary duty to John Cornell was a tort which abated upon his death?

#### LEGAL STANDARD

The court defers to the trial court's findings of fact if supported by substantial competent evidence, but exercises free review of the law and its application to the facts.

#### DISCUSSION

Margaret Watson is no longer the personal representative of John Cornell's estate. She has no standing to pursue any claims of John Cornell against Toni Johnson or claims John Cornell may have against the Cornell family trust.

Kareen Cornell, as the personal representative of John Cornell's estate, does have standing to pursue claims against Toni Johnson and the Cornell family trust.

Kareen Cornell is permitted to appeal the Magistrate's decisions that fall within Idaho Code 17-201.

The Magistrate correctly treated the two Petitions for supervised administration of the Cornell family trust as motions for summary judgment since the court considered affidavits and other evidence.

When the first petition for supervised administration was filed it included a petition to remove Toni Johnson as trustee. Idaho Code 15-7-308 provides the grounds for removal of a trustee. A trustee may be removed for specific acts of malfeasance. The court may initiate the removal of the trustee on its own motion, or in response to a petition for removal.

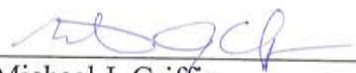
When a petition for removal of a trustee is filed that issue must be addressed by the court prior to any pending motion for supervised administration. In this case the Magistrate did not discuss the petition to remove Toni Johnson as trustee in his opinion, but merely denied the petition. This court is unable to determine if the Magistrate considered that motion or merely failed to include his reasoning in his opinion. The findings of fact would seem to indicate sufficient grounds for removing Toni Johnson as trustee, but that decision would be in the discretion of the trier of fact. This court is unable to determine from the record if the Magistrate recognized that issue as one of discretion, acted within the bounds of his discretion, and reached his decision by reason.

For that reason the case shall be remanded to the trial court to address his reasons for dismissing the petition for removal of Toni Johnson as trustee.

As a matter of guidance Idaho Code 5-327 does not apply to the facts as found by the Magistrate in this case. There was no personal injury to John Cornell. None of the property that should have been distributed to John Cornell was damaged. The breach of a fiduciary duty to distribute property from a trust to the beneficiaries is not the same as damage to the items to be distributed.

A trustee is liable under Idaho Code 15-7-306 for a variety of acts, including torts. That liability is the same as the liability of a personal representative of an estate, see the comments to Idaho Code 15-7-306 and Idaho Code 15-3-808.

Dated this 8<sup>th</sup> day of April, 2014.

  
Michael J. Griffin  
District Judge

### CERTIFICATE OF MAILING

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that a copy of the foregoing was mailed to, faxed to, or delivered by me on the 8<sup>th</sup> day of April, 2014, to:

Darrel Aherin  
Aherin, Rice & Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

☒ U.S. Mail

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
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Lewiston, ID 83501

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Theodore O. Creason  
Creason, Moore, Dokken & Geidl, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501

☒ U.S. Mail



Carrie Bird, Clerk of Court

By:   
Deputy Clerk

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
2014 MAY 13 PM 4:08  
CASE NO. CV12-277  
BY D DEPUTY

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of May, 2014, a copy of the foregoing MOTION TO REMOVE TRUSTEE was served by the method indicated below and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, PLLC  
Attorney at Law  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

\_\_\_\_ U.S. Mail  
  X   Hand Delivery  
\_\_\_\_ Facsimile  
\_\_\_\_ (208) 746-9553  
\_\_\_\_ Federal Express

  
\_\_\_\_  
Samuel T. Creason, ISB #8183



Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
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Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for the Personal Representative  
Of Estate of John Henry Cornell

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
2014 MAY 13 PM 4:08  
CASE NO. CV12-277  
BY D DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

)  
) Case No. CV 2012-00277  
)

) **MEMORANDUM IN SUPPORT**  
)

) **RE: MOTION TO REMOVE TRUSTEE**  
)  
)  
)

**I. PRELIMINARY STATEMENT**

The Court must decide whether Toni Johnson engaged in conduct during her tenure as successor trustee of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell ("Trust") such that she should be removed. The Estate of John Cornell ("Estate") asks the Court to order her removal based upon her well-established breaches of trust, failures in proper administration, and acts frustrating the purpose of the trustors in forming the trust. The Estate also moves the Court to restrain Ms. Johnson's actions during the pendency of the Court's consideration of this motion.

**MEMORANDUM IN SUPPORT  
RE: MOTION TO REMOVE - 1**

Creason, Moore, Dokken & Geidl, PLLC  
P.O. Drawer 835, Lewiston, ID 83501  
(208) 743-1516; Fax: (208) 746-2231

## **II. STATEMENT OF THE CASE**

### **A. Nature of the Case**

This matter comes before the Court on remand from the District Court instructing the Magistrate Court to determine whether Ms. Toni Johnson ought to be removed as trustee of the Trust. The District Court also provided guidance on questions regarding the survival of actions by the Estate and the availability of damages should the Estate prevail on its claims. The Estate now brings before the Court the question of removal.

### **B. Course of Proceedings**

The Estate filed a Petition for supervised administration of the Trust on February 28, 2013. The Estate's Petition alleged that Ms. Johnson: (1) failed to act in conformity with the terms of the Trust; (2) breached her fiduciary duties when acting in her capacity as Trustee; (3) engaged in equitable conversion of the property belonging to John Cornell by refusing to distribute the property; and (4) was unjustly enriched by (a) misusing Trust assets for personal desires, and (b) refusing to comply with the terms of the Trust and her fiduciary duties in order to effect a distribution in her favor. The Estate sought supervised administration, court ordered distribution of the Trust, and a judgment against Ms. Johnson for injuries caused to the Trust. The Petition set forth the following legal and equitable causes of action: (A) breach of fiduciary duty; (B) constructive trust; (C) breach of contract; (D) conversion; and (E) unjust enrichment.

No Answer has ever been filed to those allegations. Instead, Ms. Johnson filed a Motion to Dismiss the Estate's Petition on March 1. The Magistrate Court granted Ms. Johnson's Motion on June 21. In its memorandum opinion, the Court concluded that: (A) all claims for breach of fiduciary duty abated, at common law and under Idaho statute, upon death; (B) the



doctrine of constructive trust was inapplicable and an action under that doctrine was in tort, which abated upon death; (C) the claims for breach of contract were co-extensive with the statutory duties of a trustee and, therefore, were breach of fiduciary duty claims which abated upon death; (D) claims for equitable conversion sounded in tort and, therefore, abated upon death; and (E) claims for unjust enrichment sounded in tort and, therefore, abated upon death. The Magistrate Court based its ruling upon the following conclusions of law: (1) the Idaho Supreme Court Opinion of *Bishop v. Owens*, 152 Idaho 616, 619 (2012) stands for the proposition that all claims sounding in tort abate at common law upon the death of the claimant; and (2) the Idaho Legislature did not abrogate that rule with the amendment of Idaho Code § 5-327, except for claims for recovery of medical expenses, out of pocket expenses, and lost wages.

Appeal was taken to the District Court. On April 8, 2014, the District Court issued an Order reversing the ruling of the Magistrate Court and remanding the case for further proceedings. The District Court ruled that the Magistrate Court ought to have first ruled upon the question of whether Ms. Johnson should be removed as trustee of the Trust before proceeding to the arguments regarding limitation on damages and abatement. The District Court then went on to rule that: (1) damages were not limited by law in this matter; and (2) the trustee could be held liable in tort for injury to the property of John Cornell.

### **C. Statement of Facts<sup>1</sup>**

Michael and Arlie Cornell established the Trust on November 1, 1996. The Trust was established to provide for Michael and Arlie during their lifetimes, with the remainder to be

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<sup>1</sup> All of the facts set forth herein have been established through prior pleadings on record with the Court. Instead of resubmit such evidence through subsequent affidavit, Petitioner incorporates the submissions of record in this matter by reference.

distributed to their two children: Toni Johnson and John Cornell. Arlie Cornell died on November 9, 2008. Michael Cornell died on December 15, 2009. Ms. Johnson has been the sole trustee since that time.

As a successor trustee, Ms. Johnson was to have a very limited role. Ms. Johnson's sole duty as trustee was to distribute the trust assets. Over the months and years following Michael Cornell's death, Ms. Johnson failed to distribute the Trust. Instead, she "egregiously wronged her brother during his lifetime." *Mem. Opinion re Attorney Fees and Costs* at 3. "Ms. Johnson acted inappropriately in bestowing the proceeds of the trust upon herself and not shar[ing] one cent with her brother." *Id.* She refused to distribute the Trust, despite John Cornell's repeated objections and pleas that she do so, in part, so that he could "pay for necessary medical care that he could not obtain without money from the trust." *Id.* at 2. John Cornell was never able to compel distribution before his death on August 20, 2012.

Ms. Johnson's discovery responses in this case substantiate the concerns and frustrations that Mr. Cornell raised in the over two and one-half years between the surviving trustor's death and Mr. Cornell's death. At her deposition, Ms. Johnson admitted that she routinely makes personal use of the real and personal property of the Trust. She lives rent-free in the home that is included in the Trust. She has commingled cash assets of the Trust with her own cash assets. She has depleted the cash assets of the Trust, with not only expenses of the Trust but also her personal expenses. To date, the only distributions that Ms. Johnson has made are the unreported distributions made through her personal use of the Trust res.

### **III. ISSUES PRESENTED ON PETITION**

1. As successor trustee, Toni Johnson was to distribute the Trust res “as soon as reasonably possible.” Ms. Johnson concedes that she acted inequitably: she mismanaged the Trust, she commingled assets, she used Trust funds for personal use, and she refused to distribute the Trust res, despite John Cornell’s demands. John Cornell died in August 2012. Should Toni Johnson be removed as trustee?

2. Whether the Court ought to enter an order restraining Ms. Toni Johnson from making any distribution of Trust assets pending a decision on this petition?

### **IV. ANALYSIS**

#### **1. The Court should remove Ms. Toni Johnson as trustee of the Trust.**

The Idaho Uniform Probate Code sets forth the grounds upon which a court may remove the trustee of a trust. Here, several grounds exist mandating the removal of Toni Johnson as trustee of the Trust. Idaho Code § 15-7-308(2) allows for removal of a trustee where “the trustee has committed a material breach of trust;” “the trustee is unfit or unable to administer the trust;” “removal of the trustee would substantially further the trustor’s purpose in creating the trust;” or other good cause supports removal. These four grounds each independently provide grounds for removal.

Johnson should be removed because she has committed a material breach of trust. Ms. Johnson had a duty to observe reasonably prudent standards for handling the trust assets and to handle the funds for the benefit of the Trust’s beneficiaries. Idaho Code § 15-7-302. Instead, Ms. Johnson failed to keep proper accounts of the Trust and refused to provide information to Mr. Cornell. *See* Idaho Code § 15-7-303. Ms. Johnson commingled cash assets of the Trust with her own cash assets and with cash assets. Ms. Johnson stated that she has spent all of the cash assets of the Trust for her living expenses and expenses incurred maintaining and paying taxes on

the Trust property. “Ms. Johnson egregiously wronged her brother during his lifetime.” *Mem. Opinion re Atty. Fees*. Despite Mr. Cornell’s pleas, “Mr. Cornell waited in vain for funds from the trust to pay for necessary medical care that he could not obtain without money from the trust.” *Id.*

Ms. Johnson has also shown herself unable or unfit to administer the trust. Idaho Code § 15-7-308(2)(b). “Following the death of the last surviving parent, Ms. Johnson was required under state law and the terms of the trust to distribute the assets of the trust as expeditiously as possible to herself and Mr. Cornell.” *Mem. Opinion re Atty. Fees*. See Idaho Code § 15-7-301 (a trustee has a general duty “to administer the trust expeditiously for the benefit of the beneficiaries”); *Trust* § 4.03 and 4.04. Ms. Johnson has failed to make a single proper distribution of the Trust in the 3.5 years she has served as trustee.

Ms. Johnson should be removed because doing so would substantially further the trustor’s purpose. Idaho Code § 15-7-308(2)(e). “Ms. Johnson entirely thwarted the intentions of her parents in establishing the trust for her brother to receive half the estate. Ms. Johnson dishonored the trust her father placed in her when he named her as the sole person responsible for distribution of the trust. Ms. Johnson acted inappropriately in bestowing the proceeds of the trust upon herself and not share one cent with her brother.” Instead, “Ms. Johnson used funds from the trust for her personal expenses . . . . Ms. Johnson lived rent free in the home that is included in the Trust.” *Mem. Opinion re Atty. Fees*. Ms. Johnson has, and continues to, frustrate the clear purpose of the trustors through her actions as trustee.

Other good cause exists for the removal of Ms. Johnson as trustee of the Trust. Idaho Code § 15-7-908(2)(f). Ms. Johnson’s intransigence during her tenure as trustee evidences her

settled position of contempt for the interests of her brother as beneficiary of the Trust. The breaches set forth herein are not isolated or innocent, but rather establish a pattern of unwillingness to act in accordance with her duties as trustee.

**2. Whether the Court ought to enter an order restraining Ms. Toni Johnson from making any distribution of Trust assets pending a decision on this petition?**

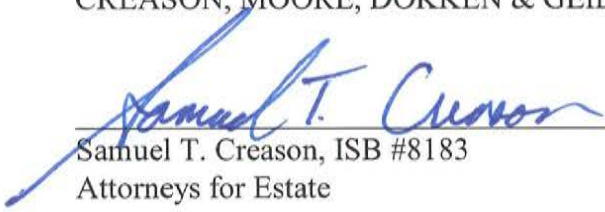
The Court has authority to “order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries” pending a determination on removal. Idaho Code § 15-7-308(3). Given the malfeasance set forth herein, the Estate requests that the Court enter an order restraining Ms. Toni Johnson from making any distribution of Trust assets pending a ruling.

**IV. CONCLUSION**

The record in this case has established the indisputable nature of Ms. Johnson’s mishandling of the Trust. Based upon the authorities set forth herein, the Estate asks that the Court remove Ms. Johnson from her position as trustee of the Trust.

DATED this 12<sup>th</sup> day of May, 2014.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
\_\_\_\_\_  
Samuel T. Creason, ISB #8183  
Attorneys for Estate

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of May, 2014, I filed the foregoing MEMORANDUM IN SUPPORT RE: MOTION TO REMOVE TRUSTEE with the Clerk of the Court, and provided a paper copy to the following persons:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

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Samuel T. Creason, ISB #8183

Theodore O. Creason, ISB #1563  
Samuel T. Creason ISB #8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for the Personal Representative  
Of Estate of John Henry Cornell

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
2014 MAY 13 PM 4:09  
CASE NO. CV12-277  
BY D DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:


THE REVOCABLE FAMILY TRUST  
OF MICHAEL S. CORNELL AND  
ARLIE M. CORNELL.

) Case No. CV 2012-00277  
)  
)  
) **NOTICE OF HEARING**  
)  
) **RE: MOTION TO REMOVE**  
) **TRUSTEE**  
)  
)

NOTICE IS HEREBY GIVEN that the undersigned will call on for hearing the MOTION TO REMOVE TRUSTEE before the Magistrate on Tuesday, May 27, 2014, at 3:00 p.m., or as soon thereafter as counsel may be heard, in a courtroom of the Clearwater County Courthouse, Orofino, Idaho.

DATED this 17<sup>th</sup> day of May, 2014.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
\_\_\_\_\_  
Samuel T. Creason, ISB # 8183  
Attorneys for Estate

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 17<sup>th</sup> day of May, 2014, a copy of the foregoing NOTICE OF HEARING was served by the method indicated below, and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

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\_\_\_\_\_  
Samuel T. Creason, ISB #8183



CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

CASE NO. CV 12-277

BY D DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

Case No. CV 2012-00277

## APPLICATION FOR APPOINTMENT OF TRUSTEE

(Idaho Code § 15-7-403)

(1) Applicant's interest in this matter is that of Personal Representative of the Estate of John Henry Cornell ("Estate"); the Estate claims a beneficiary interest in the Trust. Applicant has priority as the only representative of a beneficiary interest other than:

NAME	RELATIONSHIP/PRIORITY	ADDRESS
Toni C. Johnson	Current Trustee & Beneficiary	c/o Karin Seubert Jones, Brower & Callery, P.L.L.C. 1304 Idaho Street P.O. Box 854 Lewiston, ID 83501

**Creason, Moore, Dokken & Geidl, PLLC**  
P.O. Drawer 835, Lewiston, ID 83501  
(208) 743-1516; Fax: (208) 746-2231

(2) The Michael and Arlie Cornell established the Trust on November 1, 1996. The Trust was established to provide for Michael and Arlie during their lifetimes, with the remainder to be distributed to their two children: Toni Johnson and John Cornell. Arlie Cornell died on November 9, 2008. Michael Cornell died on December 15, 2009. Ms. Johnson has been the sole Trustee since that time. The true state of assets and liabilities of the Trust are unknown at this time as a result of administration by Ms. Johnson.

(3) Applicant has filed a Motion to Remove the Trustee, concurrently herewith. The existing trustee of the trust is:

NAME	ADDRESS
Toni C. Johnson	c/o Karin Seubert Jones, Brower & Callery, P.L.L.C. 1304 Idaho Street P.O. Box 854 Lewiston, ID 83501

(4) Appointment is sought for:

NAME	ADDRESS
Kareen Cornell	P.O. Box 361 Heyburn, ID 83336

(5) There exist no contingent beneficiaries for the trust.

(6) A copy of the trust is in the possession of the Court.

(7) After the exercise of reasonable diligence, the Applicant is unaware of any instrument revoking the trust.

(8) Termination of the appointment of the prior trustee is sought through pleadings filed concurrently herewith.

WHEREFORE, APPLICANT REQUESTS:

- DATED this 12<sup>th</sup> day of May, 2014.

  
Samuel T. Creason, ISB #8183  
Attorneys for Applicant

STATE OF IDAHO )  
 : ss.  
County of CASSIA )

Karen Cornell  
Karen Cornell

(SEAL)  
GARALD E. PRICE  
NOTARY PUBLIC  
STATE OF IDAHO

**Creason, Moore, Dokken & Geidl, PLLC**  
P.O. Drawer 835, Lewiston, ID 83501  
(208) 743-1516; Fax: (208) 746-2231

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of May, 2014, I filed the foregoing APPLICATION FOR APPOINTMENT OF TRUSTEE with the Clerk of the Court, and provided a paper copy to the following persons:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

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\_\_\_\_\_  
Samuel T. Creason, ISB #8183

Theodore O. Creason, ISB #1563  
 Samuel T. Creason ISB #8183  
 CREASON, MOORE, DOKKEN & GEIDL, PLLC  
 1219 Idaho Street  
 P.O. Drawer 835  
 Lewiston, ID 83501  
 Telephone: (208) 743-1516  
 Facsimile: (208) 746-2231  
 Attorneys for Personal Representative  
 Of Estate of John Henry Cornell

FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 MAY 13 PM 4:09

CASE NO. CV12-277

BY D DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

) Case No. CV 2012-00277

) **ACCEPTANCE OF APPOINTMENT**

) (Idaho Code § 15-7-403)

STATE OF IDAHO )

: ss.

County of Cassia )

The undersigned hereby accepts appointment to the office of trustee of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell and agrees to perform and discharge the trust of that office. The undersigned hereby submits personally to the jurisdiction of this Court in

ACCEPTANCE OF APPOINTMENT- 1

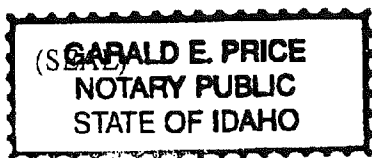
Creason, Moore, Dokken & Geidl, PLLC  
 P.O. Drawer 835, Lewiston, ID 83501  
 (208) 743-1516; Fax: (208) 746-2231

any proceeding relating to the trust that may be instituted by an interested person as defined by the Idaho Uniform Probate Code.

DATED this 12 day of May, 2014.

Kareen Cornell  
Kareen Cornell

SUBSCRIBED AND SWORN to before me this 12 day of May, 2014.



Garald Price  
Notary Public for Idaho  
Residing or employed at Burley Idaho  
My Appointment Expires: 6-1-17

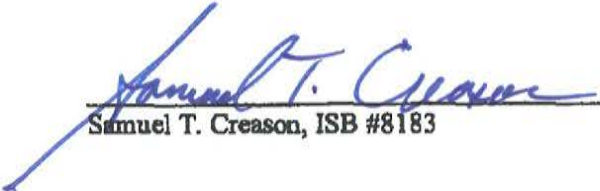


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of May, 2014, I filed the foregoing ACCEPTANCE OF APPOINTMENT with the Clerk of the Court, and provided a paper copy to the following persons:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

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Samuel T. Creason, ISB #8183

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Attorneys for the Personal Representative  
Of Estate of John Henry Cornell

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
2014 MAY 13 PM 4:09  
CASE NO. CV12-277  
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**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST  
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) Case No. CV 2012-00277  
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) **NOTICE OF HEARING**  
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) **RE: APPLICATION FOR**  
) **APPOINTMENT OF TRUSTEE**  
)  
)

NOTICE IS HEREBY GIVEN that the undersigned will call on for hearing the APPLICATION FOR APPOINTMENT OF TRUSTEE before the Magistrate on Tuesday, May 27, 2014, at 3:00 p.m., or as soon thereafter as counsel may be heard, in a courtroom of the Clearwater County Courthouse, Orofino, Idaho.



DATED this 12<sup>th</sup> day of May, 2014.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
\_\_\_\_\_  
Samuel T. Creason, ISB # 8183  
Attorneys for Estate


**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 12<sup>th</sup> day of May, 2014, a copy of the foregoing NOTICE OF HEARING was served by the method indicated below, and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, ID 83501

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Samuel T. Creason, ISB #8183

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 MAY 23 PM 12:53

CASE NO.

CV12-277

BY

DEPUTY

**Karin Seubert**  
**JONES, BROWER & CALLERY, P.L.L.C.**  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

Case No. CV 2012-00277

**OBJECTION TO MOTION TO  
 REMOVE TRUSTEE & APPLICATION  
 FOR APPOINTMENT OF TRUSTEE**

COMES NOW Respondent Toni Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and objects to the *Motion to Remove Trustee and Application for Appointment of Trustee* filed by Kareen Cornell, as Personal Representative of the Estate of John Henry Cornell (the "Estate"), and set for hearing in this matter on May 27, 2014 at 3:00 p.m.

The primary basis of this objection, as discussed further below, is that the Estate's requests are outside the scope of the Magistrate Court's authority on remand.

As this Court is familiar, this proceeding involves two separate petitions, one filed by John Cornell during his lifetime (*Petition for Supervised Administration and Removal of Trustee* filed July 11, 2012 ("First Petition")) and a second filed by the Estate (*Petition for Supervised Administration and Court Ordered Distribution* dated February 26, 2013 ("Second Petition")). The First Petition and Second Petition involve the same factual allegations, however only the First

OBJECTION TO MOTION  
 TO REMOVE...

Petition sought the relief of removal of the trustee. The Estate now seeks to expand the scope of its Second Petition through the *Motion to Remove Trustee* and *Application for Appointment of Trustee* to include removal of the trustee.

Respondent sought dismissal of both petitions based on the abatement of John Cornell's claims upon his death, which this Magistrate Court granted. See *Judgments of Dismissal* dated February 25, 2013 and June 21, 2013. Margaret Watkins appealed the dismissal of the First Petition. See *Notice of Appeal* dated March 25, 2013. The Estate expressly "decline[d] any invitation to participate in [Watkins' appeal of the First Petition] as a pseudo-party and, thereby, waive its right to a separate and distinct judicial process." *Brief of Estate re: Watkins' Appeal* dated June 10, 2013. The Estate appealed the dismissal of the Second Petition. See *Notice of Appeal* dated July 1, 2013. The District Court addressed both appeals concurrently, concluded that Margaret Watkins lacked standing to pursue any claims of John Cornell, and remanded the case to the Magistrate Court "to address [its] reasons for dismissing the petition for removal of Toni Johnson as trustee." See *Order RE: Appeal* and *Order Remanding Case* filed April 8, 2014. Subsequently, the Estate filed the subject *Motion to Remove Trustee* and *Application for Appointment of Trustee*.

"Issues not raised below but raised for the first time on appeal will not be considered or reviewed. The general rule is that, on remand, a trial court has authority to take actions it is specifically directed to take, or those which are subsidiary to the actions directed by the appellate court." *Mountainview Landowners Coop. Assn., Inc. v. Cool*, 142 Idaho 861, 866, 136 P.3d 332, 337 (2006) (quoting *Whitted v. Canyon County Bd. of Comm'rs*, 137 Idaho 118, 112, 44 P.3d 1173, 1177 (2002); *State v. Hosey*, 134 Idaho 883, 886, 11 P.3d 1101, 1104 (2000)).

The Idaho Supreme Court addressed a similar procedural situation in *Walters v. Industrial Indemnity Co. of Idaho*, 130 Idaho 836, 949 P.2d 223 (1997) ("*Walters II*"). In *Walters I*, the Idaho Supreme Court reversed the trial court's dismissal for lack of subject matter jurisdiction. 127 Idaho 933, 908 P.2d 1240. Subsequent to said decision, the claimant sought to amend his complaint to raise constitution claims that had previously not been raised before the trial court and that the appellate court had refused to consider in its *Walters I* decision. 130 Idaho at 837, 949 P.2d at 224. In *Walters II*, the Court concluded that the trial court lacked jurisdiction to consider a motion to amend on remand. *Id.* at 837-38, 949 P.2d at 224-25 (quoting *Mountain Home Lumber Co. v.*

OBJECTION TO MOTION  
TO REMOVE...

*Swartwout*, 33 Idaho 737, 740-41, 197 P. 1027, 1028 (1921) ("The mandate of the reviewing court is binding upon the lower court, and must be strictly followed. Where the appellate court remands a cause with directions to enter judgment for one of the parties, the judgment of the appellate court is a final judgment in the cause, and the entry thereof in the lower court is a purely ministerial act... A trial court has no authority to enter any judgment or order not in conformity with the order of the appellate court. That order is conclusive on the parties, and no judgment or order different from or in addition to that directed by it can have any effect. No modification of the judgment so directed can be made by the trial court, nor can any provision be ingrafted on or taken from it.").

Here, the District Court has empowered the Magistrate Court on remand to "address [its] reasons for dismissing the petition for removal of Toni Johnson as trustee." See *Order RE; Appeal* filed April 8, 2014. The only reasonable reading of said ruling is that it relates to the First Petition only, since the Second Petition contained no such removal request, as supported by the Estate's recognition of the same and request to seek such additional relief. Because said relief is outside the scope of the Second Petition, the *Motion* and *Application* before the Court essentially constitute amendments to the Second Petition without leave of this Court as required by I.R.C.P. 15(a).

As was the procedural circumstances in the *Walter* proceeding discussed above, the Magistrate Court lacks authority on remand to grant such leave to amend or to consider the additional relief sought. As such, said *Motion* and *Application* should be denied.

Because the Estate did not appeal the dismissal of the First Petition and instead the appeal of its dismissal was pursued by a party that the District Court concludes lacked standing, then the dismissal of the First Petition cannot now at this late date be revived by the Estate, who expressly declined to participate in the Watkins' appeal. See *State v Tucker*, 103 Idaho 885, 655 P.2d 92 (Ct.App. 1982) (holding that the requirement of perfecting an appeal within the applicable time period is jurisdictional; an appeal taken after expiration of the filing period will be dismissed). For purposes of the appeal of the First Petition's dismissal, the Estate is not Margaret Watkins successor. As such, the Estate has waived any and all potential arguments relative to the trustee's removal as raised in the First Petition.

Respondent additionally notes that this Court expressly gave the Estate, through its then newly appointed personal representative, twenty days from February 15, 2013 to file claims on behalf of the Estate. See *Memorandum Opinion and Judgment for Dismissal* entered February 15,

OBJECTION TO MOTION  
TO REMOVE...

2013. Said time period expired on March 7, 2013. The *Motion* and *Application* now before the Court were not filed until May 13, 2014, and are untimely based upon this Court's prior order.

Even if the Estate had timely raised or preserved the removal issue, it lacks standing under the statute to seek removal of the trustee. Section 15-7-308(1) of the Idaho Code provides as follows:

A trustee may be removed in accordance with the terms of the trust or by the court on its own initiative or on petition of a trustor, cotrustee, or beneficiary.

The *Motion to Remove Trustee* fails to comply with said requirement, and as such, should be dismissed. Said *Motion* is brought by Kareen Cornell, acting in her capacity as Personal Representative of the Estate of John Henry Cornell. It is not brought by the Court on its own initiative. The Estate is neither a trustor nor cotrustee. The Estate is not a beneficiary of the Trust, which expressly provides that all net income and principal remaining in the Trust Estate vest in Respondent as the sole surviving beneficiary upon the death of John H. Cornell where John H. Cornell leaves no surviving issue. See Trust at § 4.03(a).

As such, the Estate now lacks standing to pursue a removal action. Similarly, even if the removal action within the First Petition had been preserved, the Estate lacked standing to pursue upon John Cornell's death. Any other conclusion would lead to ridiculous results where the trustee sought to be removed is the sole surviving sole beneficiary.

As to the consideration of the removal action contained in the First Petition, the same analysis applies. While John Cornell had standing to make such a request during his lifetime, upon his death, said standing lapsed upon his death under the express terms of the Trust. Because John Cornell's claims against the trustee abated upon his death, no party retained standing or a legitimate interest to pursue the trustee removal action, so good cause exists for its dismissal as was implicit in this Court's original ruling.

For these reasons, Respondent requests that this Court deny the Estate's *Motion to Remove Trustee* and *Application for Appointment of Trustee* and confirm its implicit denial of the dismissal of the removal action contained in the First Petition.

OBJECTION TO MOTION  
TO REMOVE...

DATED this 23 day of May, 2014.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *OBJECTION TO MOTION TO REMOVE TRUSTEE AND APPLICATION FOR APPOINTMENT OF TRUSTEE* was, this 23 day of May, 2014, transmitted via facsimile to:

Samuel T. Creason  
Creason, Moore, Dokken & Geidl  
1219 Idaho St.  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

OBJECTION TO MOTION  
TO REMOVE...







IN THE MATTER OF MICHAEL S. CORNELL  
CASE NO. CV2012-277

- 3:30 Mr. Creason believes Court is misreading Judge Griffin's decision.
- 3:32 Court believes abatement does extinguish any remedy.
- 3:33 Mr. Creason argues the abatement issue was briefed and argued in front of the District Court. If Judge Griffin wasn't over turning your decision on abatement why would he remand at all.
- 3:33 Colloquy with Court and counsel regarding issue of appointment of trustee.
- 3:34 Mr. Creason states he is not removing his request. Asks the Court to enter a temporary restraining order/injunction against the trustee and to grant two weeks to do some research and re-brief it for another remand.
- 3:35 Colloquy with Court and counsel regarding a remand.
- 3:36 Court states when an appeal is filed a motion for stay could be granted.
- 3:37 Court states he's inclined to grant Mr. Creason the two weeks.
- 3:38 Colloquy with Court and counsel regarding probate.
- 3:38 Mr. Creason states the objection was untimely and should be stricken for time factors. Also, states their Motion that's unopposed.
- 3:39 Court asks Mr. Creason if he would still like the two weeks.
- 3:39 Mr. Creason feels one week would be sufficient.
- 3:39 Ms. Seubert apologizes for not filing objection timely. She explains time factors came from Mr. Creason and his client.
- 3:40 Ms. Seubert argues her objection.
- 3:42 Colloquy with Court and counsel regarding what remand asked Court to do.
- 3:46 Ms. Seubert would like to make clear for the record in terms of consideration for this removal action that this case has never had an evidentiary hearing. She feels the Court has only ever heard one side of the story during this entire case.



IN THE MATTER OF MICHAEL S. CORNELL  
CASE NO. CV2012-277

- 3:48 Ms. Seubert argues her reading of Judge Griffin's decision is he has inadvertently confused the removal of personal representative with the removal of a trustee and that there is not an automatic stay in the removal of a trustee, only contained in the removal of a personal representative.
- 3:48 Colloquy with Court and counsel regarding automatic stay in estates.
- 3:50 Ms. Seubert states she is reading from Idaho Code 15-3611 Part A which deals with termination of appointment by removal with cause.
- 3:51 Mr. Creason doesn't feel the stay issue is effecting the Court proceedings today. Mr. Creason feels the Court has authority under 15-7-308 sub. 3 to stay.
- 3:53 Mr. Creason states the heir can come in and motion for removal of PR.
- 3:53 Mr. Creason feels the Judge has said that Ms. Johnson can be held liable and that the Judge has said that this Court should consider whether Ms. Johnson should be removed and for the reasons in our briefing she should be removed.
- 3:54 Court is in recess.

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
2014 JUN 16 PM 3:10  
CASE NO. CV2012-277  
BY BO DEPUTY

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

MEMORANDUM OPINION  
RE REMAND ORDER

This case concerns a trust which identifies John Cornell and Toni Johnson as beneficiaries. John Cornell died before his sister and trustee of the trust, Toni Johnson, distributed John Cornell's share of the trust to him. Under the terms of the trust, Toni Johnson is entitled to the entire trust as John Cornell passed away before he received any part of the trust.

John Cornell's widow, Kareen Cornell, filed a petition for supervised administration and court ordered distribution seeking relief against Toni Johnson based upon claims personal to John Cornell for how Toni Johnson allegedly mishandled the trust. The issue animating this case is whether John Cornell's claims against Toni Johnson survive his death.

 SCANNED  
06/18/2014

MEMORANDUM OPINION-1  
RE: REMAND ORDER

## HISTORY OF THE CASE

On July 11, 2012, this case was initiated by John Cornell as a Petition for Supervised Administration and Removal of Trustee. John Cornell died on August 20, 2012. Margaret Watkins, a relative of John Cornell, pursued the claims of John Cornell set forth in his Petition after his death.

On September 14, 2012, Toni Johnson filed a Motion to Dismiss the Petition on the grounds that the claims of John Cornell were abated upon the death of John Cornell. This Motion was granted on February 15, 2013 based upon a Memorandum Opinion filed on the same date.

On February 26, 2013, Kareen Cornell filed on behalf of the deceased John Cornell a petition for supervised administration and court ordered distribution. On March 14, 2013, Toni Johnson filed a Motion to Dismiss based again upon abatement of the claims of John Cornell upon his death. After considering the briefs and oral arguments of the parties, this Court on June 21, 2013, granted the Motion to Dismiss and dismissed the action based upon a Memorandum Opinion filed on the same date.

Timely appeals were taken by Kareen Cornell and Margaret Watkins. On April 8, 2014, the District Court remanded this case for this Court “to address his reasons for dismissing the petition for removal of Toni Johnson.” Order Re Appeal at 3. On May 13, 2014, Kareen Cornell, after the remand order, filed a Motion To Remove Trustee and an Application for Appointment of Trustee seeking appointment of herself to serve as trustee.

On May 27, 2014, oral argument was heard with regards to the remand order and Kareen Cornell’s motions. Kareen Seubert appeared on behalf of Toni Johnson

and Samuel Creason appeared on behalf of Kareen Cornell. This Memorandum Opinion addresses the remand order and Kareen Cornell's Motions together.

### DISCUSSION

The remand order specifically requests this Court to address the petition for removal of Toni Johnson. Significantly, the request for removal of Toni Johnson as trustee was only made in the original Petition filed by John Cornell and pursued after his death by Margaret Watkins. The District Court found Margaret Watkins to not have any standing to pursue the claims of John Cornell against Toni Johnson. Therefore, she has no standing to seek removal of Toni Johnson as trustee. Idaho Code § 15-7-308(1).

Kareen Cornell did not request removal of Toni Johnson until after the remand order was filed. Therefore there was no party with standing who had requested removal of Toni Johnson prior to the remand order. However, the merits of the request for removal of the trustee as set forth in the remand order and the motions filed by Kareen Cornell after the remand order will be addressed.

Idaho Code § 15-7-308(1) sets forth the terms of when a trustee can be removed: "A trustee may be removed in accordance with the terms of the trust or by the court on its own initiative or on petition of a trustor, cotrustee, or beneficiary."

Kareen Cornell is not a trustor or a cotrustee. Nor is she a beneficiary as set forth in this Court's prior opinion. Kareen Cornell's only claim to the trust is derivative through her deceased husband for the wrongs Toni Johnson allegedly committed while administering the estate. These derivative claims are abated by the death of John

Cornell. Therefore, Kareen Cornell is not a beneficiary. Therefore, she has no standing to request removal of Toni Johnson as the trustee.

The wrongs Toni Johnson is alleged to have committed are against John Cornell. The claims of John Cornell, given the type of claims asserted, abated with his death. It would be anomalous to remove the sole surviving beneficiary as the trustee. It would make no sense to remove the sole beneficiary from handling the distribution of the estate to herself.

The decision to remove a trustee is discretionary. It makes no sense to exercise that discretion against the sole beneficiary under the circumstances of this case. No allegation has been made that Toni Johnson is incapable of handling her own affairs. Therefore, I deny Kareen Cornell's motion to remove Toni Johnson as the trustee.

Kareen Cornell's application for appointment of trustee is also denied for the same reasons that her motion for removal of trustee is denied. Kareen Cornell has no interest in the trust and could be expected based upon her claims to interfere with Toni Johnson's rights as the sole beneficiary. Also, appointment of someone other than Toni Johnson to serve as trustee would violate the terms of the trust. Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell dated November 1, 1996 at § 9.01 and as amended on August 6, 2009, attached as Exhibits A and B to Affidavit of Karin Seubert dated September 17, 2012.

The District Court also offers "(a)s a matter of guidance Idaho Code § 5-327 does not apply to the facts as found by the Magistrate in this case." Order Re Appeal at 3. Kareen Cornell argues that the District Court is thereby directing this Court to address the merits of her claim irrespective of the abatement of John Cornell's claims. Kareen

Cornell's argument is rejected as it fails to recognize that the basis for the dismissal of her claims rests upon the common law, not Idaho Code § 5-237, and that this Court agrees with the District Court's analysis of Idaho Code § 5-237.

As to the merits, there is no question that the state legislature created a cause of action against the trustee for wrongs committed by the trustee as alleged in this case. There is no question that John Cornell if he was alive would have a cause of action based upon the allegations of malfeasance committed by Toni Johnson.

However, the essence of the abatement doctrine is that it extinguishes causes of action once the wronged individual dies. In this case, the alleged wronged individual, John Cornell, died without having his claims resolved before his death. Under the common law doctrine of abatement as set forth by the Idaho Supreme Court in *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012), this Court found that John Cornell's actions abated with his death. *Memorandum Opinion Re Kareen Cornell* June 21, 2013 at 9-18 and *Memorandum Opinion* February 15, 2013 at 5-13.

The Supreme Court noted in *Bishop*, "The abatement rule holds that in the absence of a legislative enactment addressing the survivability of a claim, the common law rules govern." *Bishop v. Owens*, 152 Idaho 616, 619, 272 P.3d 1247, 1250 (2012). The Supreme Court also noted that the Idaho state legislature in 2010 modified the common law rule very narrowly at Idaho Code § 5-237 allowing some derivative actions to proceed which would otherwise be abated under the common law. However, in *Bishop*, the Supreme Court did not retroactively address the reach of the law.

Thus, applying the District Court's guidance, Idaho Code § 5-237 does not apply. Therefore, the common law as interpreted by the Idaho Supreme Court requires finding the claims of John Cornell abate upon his death.

To make clear, Idaho Code § 5-237 modifies the common law of abatement. Idaho Code § 5-237 allows for some types of actions to proceed that would otherwise be prohibited under the common law of abatement. The decision as to whether abatement extinguishes a cause of action is a two-step process. First, are the claims abated under the common law? Second, if abated under the common law, does Idaho Code § 5-237 override the common law and allow for the derivative claim to proceed?

This Court applied the test adopted by the Supreme Court in *Bishop* and found that Kareen Cornell's derivative claims based upon the alleged wrongs done to her husband are abated under the common law. Kareen Cornell has provided no new argument as to why this Court's analysis is incorrect nor does the District Court's remand address the abatement of the claim under common law. Thus, this Court adheres to its analysis provided in the two earlier Memorandum Opinions and finds that Kareen Cornell's derivative claims are abated under the common law.

The District Court's guidance that Idaho Code § 5-237 does not apply to this case is precisely the result also found by this Court. "Therefore, Idaho Code § 5-237(2) does not overrule the common law abatement of John [Cornell's] causes of action." *Memorandum Opinion* February 15, 2013 at 17. As set forth in the earlier Memorandum Opinions, the wrongs alleged to have been committed by Toni Johnson do not survive under the common law of abatement nor do the alleged wrongs come within the ambit of Idaho Code § 5-237 which supersedes the common law under very limited

circumstances. Those limited circumstances are simply not present in this case.

*Memorandum Opinion* February 15, 2013 at 13-17. Thus, dismissal of Kareen Cornell's Petition is appropriate.

Kareen Cornell makes two additional arguments in support of her Motions at the hearing. Kareen Cornell argues that this Court should grant her motion to remove Toni Johnson as trustee because Ms. Johnson never filed an objection to her motion until four days before the hearing. I reject Kareen Cornell's argument. The arguments have been addressed several times during the course of this action. Kareen Cornell has not shown any prejudice.

Kareen Cornell also asks for an order restraining Toni Johnson from taking further action with respect to the trust. Idaho Code § 15-7-308(3) provides, "Pending a final decision on the petition to remove the trustee, the court may order such appropriate relief as may be necessary to protect the trust property or the interests of the beneficiaries." I do not choose to exercise my discretion to order a restraining order. A final decision is made based upon this Memorandum Opinion to dismiss Kareen Cornell's Petition. I do not find Kareen Cornell to be a beneficiary whose interest would be protected by a restraining order. It has been more than two (2) years since this case was initiated.

I do not find it appropriate to override the clear language of the trust granting Toni Johnson the whole trust upon her brother's death. In any event, if this Court's decision on abatement is incorrect and Ms. Kareen Cornell's arguments on the merits prevail on appeal, Toni Johnson will be liable for any wrongs committed.



## CONCLUSION

In compliance with the remand order, the motion to remove Toni Johnson as the trustee is denied for the reasons set forth in this Memorandum Opinion. Kareen Cornell's motions filed after the remand order are also denied for the reasons set forth in this Memorandum Opinion. The decision to dismiss Kareen Cornell's Petition is reaffirmed.

Dated this 16th day of June, 2014.

  
Randall W Robinson, Magistrate

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Memorandum Opinion Re Remand Order was mailed postage pre-paid, on the 16<sup>th</sup> day of June, 2014, to:

Samuel Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By:   
Deputy Clerk



MEMORANDUM OPINION-8  
RE: REMAND ORDER

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
2014 JUN 15 PM 3:14  
W2012-277  
BD DEPUTY

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

FINAL JUDGMENT  
RE REMAND ORDER

Based upon Findings of Fact and Conclusions of law filed in the Memorandum Opinion Re Remand Order in this Case on June 16, 2014, and good cause appearing thereby, IT IS HEREBY ORDERED


That consistent with the Remand Order of the District Court, the motion for removal of the Trustee IS HEREBY DENIED for the reasons set forth in the Memorandum Opinion;

That Kareen Cornell's Motion to Remove Trustee and Application for Removal of Trustee filed after the Remand Order was entered ARE HEREBY DENIED;

That the Judgment for Dismissal filed in this case on June 21, 2013 is hereby reaffirmed and Kareen Cornell's Petition for Supervised Administration and Court Ordered Distribution IS HEREBY DISMISSED with prejudice.

Dated this 16th day of June, 2014.

SCANNED  
06/18/2014

  
Randall W Robinson, Magistrate

FINAL JUDGMENT-1  
RE REMAND ORDER

## CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Final Judgment Re Remand Order was mailed postage pre-paid, on the 16<sup>th</sup> day of June, 2014, to:

Samuel Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By: Bali Bird  
Deputy Clerk



FILED  
T-087 P0002/0005 F-989  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 JUN 20 PM 12:52  
CASE NO. CV 2012-277

BY JS DEPUTY

Karin Seubert  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

Case No. CV 2012-00277

**MOTION TO CORRECT CLERICAL  
MISTAKES**

COMES NOW Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C., and pursuant to I.R.C.P. 60(a), hereby moves this Court for a court order confirming and clarifying that its citations to Idaho Code § 5-237 (emphasis added) on pages 5 and 6 of the *Memorandum Opinion re: Remand Order* entered on June 16, 2014 were clerical errors and that the intended statutory citations are Idaho Code § 5-327.

DATED this 20 day of June, 2014.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
Karin Seubert  
Attorney for Respondent

MOTION TO CORRECT  
CLERICAL MISTAKES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *MOTION TO CORRECT CLERICAL MISTAKES* was, this 20 day of June, 2014,

☒ hand-delivered by providing a copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
☐ by first class mail; or  
☐ transmitted via facsimile

to:

Samuel Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

MOTION TO CORRECT  
CLERICAL MISTAKES



Karin Seubert  
 JONES, BROWER & CALLERY, P.L.L.C.  
 Attorneys at Law  
 Post Office Box 854  
 1104 Idaho Street  
 Lewiston, ID 83501  
 208/743-3591  
 Idaho State Bar No. 7813

CLERK OF DISTRICT COURT  
 CLEARWATER COUNTY

2014 JUN 20 PM 12:52

CASE NO. CV2012-277

BY lf DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
 MICHAEL S. CORNELL AND ARLIE M.  
 CORNELL.

Case No. CV 2012-00277

NOTICE OF HEARING

YOU WILL PLEASE TAKE NOTICE that Respondent Toni C. Johnson, by and through her attorney of record, Karin Seubert of Jones, Brower and Callery, P.L.L.C. will call up for hearing her *Motion to Correct Clerical Mistakes* at the hour of 2:15 p.m. on July 7, 2014, before the Honorable Magistrate of the above Court.

DATED this 20 day of June, 2014.

JONES, BROWER & CALLERY, P.L.L.C.

By Karin Seubert  
 Karin Seubert  
 Attorney for Respondent

NOTICE OF HEARING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *NOTICE OF HEARING* was, this 20 day of June, 2014,

☒ hand-delivered by providing a  
copy to: Valley Messenger Service;  
☐ hand-delivered;  
☐ mailed, postage pre-paid,  
by first class mail; or  
☐ transmitted via facsimile

to:

Samuel Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
1219 Idaho St.  
P.O. Drawer 835  
Lewiston, ID 83501

By Karin Seubert  
Karin Seubert

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF

MICHAEL S. CORNELL, ETAL.

)  
)  
)  
)  
)

Case No: CV-2012-0000277

COURT MINUTES

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

JUL -7 PM 2:32

CASE NO. CV2012-277

Presiding Judge: Randall W. Robinson

Court Clerk: Lisa McMillan

Monday, July 07, 2014 at 02:15 PM

Tape/Disk 625-1

Plaintiff's Counsel:

Defendant's Counsel:

Court Hearing Type: Motion

FOOTAGE/TIME:

2:29 Honorable Randall W. Robinson presiding. Present in court: Ms. Seubert

2:29 Ms. Seubert states Mr. Creason has no  
objection since he wasn't able to be here.


2:30 Ms. Seubert states she does have a  
order clarifying citations.

2:31 Court states he will sign order.

2:31 Court is in Recess.



**Karin Seubert**  
JONES, BROWER & CALLERY, P.L.L.C.  
Attorneys at Law  
Post Office Box 854  
1104 Idaho Street  
Lewiston, ID 83501  
208/743-3591  
Idaho State Bar No. 7813

FILED  
JUDICIAL DISTRICT COURT  
CLEARWATER COUNTY  
2014 JUL -7 PM 2:32  
CASE NO. **CV2012-277**  
BY 

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: )  
 )  
THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. )  
\_\_\_\_\_ )

Case No. CV 2012-00277

**ORDER CLARIFYING CITATIONS**

This matter having been called for hearing on July 7, 2014 on Respondent Toni C. Johnson's *Motion to Correct Clerical Mistakes*, and good cause shown, IT IS HEREBY ORDERED AND CONFIRMED that all references to Idaho Code § 5-237 contained in the *Memorandum Opinion re: Remand Order* entered in this proceeding on June 16, 2014 were in error, and the intended statutory citations are Idaho Code § 5-327. Said *Memorandum Opinion re: Remand Order* is hereby incorporated herein by reference and amended in accordance with this *Order*.

DATED this 7th day of July, 2014.

  
JUDGE RANDALL W. ROBINSON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *ORDER CLARIFYING CITATIONS* was, this 7 day of July, 2014,

\_\_\_\_\_ hand-delivered by providing a copy to: Valley Messenger Service;  
\_\_\_\_\_ hand-delivered;  
☒ mailed, postage pre-paid,  
\_\_\_\_\_ by first class mail; or  
\_\_\_\_\_ transmitted via facsimile

to:

Karin Seubert  
Jones, Brower and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
P.O. Drawer 835  
Lewiston, ID 83501

By *Lisa McMillin*  
Clerk of Court



FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2012 APR 10 PM 1:55

CASE NO. **CR12-277** ✓

EY **VA** DEPUTY

Samuel T. Creason, ISBN: 8183  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:	)	Case No. CV 2012-00277
	)	
THE REVOCABLE FAMILY TRUST OF	)	<b>NOTICE OF APPEAL</b>
MICHAEL S. CORNELL AND ARLIE M.	)	
CORNELL.	)	I.R.C.P. 83
	)	Fee Category: L(2)
	)	Filing Fee: \$81.00
	)	

TO: TONI C. JOHNSON, AND HER ATTORNEY, KARIN SEUBERT, JONES,  
BROWER, & CALLERY, P.L.L.C., 1304 IDAHO STREET, P.O. BOX 854,  
LEWISTON, ID 83501. EMAIL: KRSEUBERT@LEWISTON.COM

AND

THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The Estate of John Henry Cornell, acting through its personal representative, Kareen Cornell, (hereinafter the "Estate") files this appeal from the Magistrate Court in and for the County of Clearwater.

2. The Estate appeals to the District Court in and for the County of Clearwater.

3. The Estate appeals the Magistrate Court's denial of the Estate's Motion to Remove Trustee and Application for Removal of Trustee and dismissal of the Estate's Petition for Supervised Administration and Court Ordered Distribution. The Court's denial and dismissal are set forth in its June 16, 2014, FINAL JUDGMENT RE: REMAND ORDER and MEMORANDUM OPINION RE: REMAND ORDER upon which the judgment was based.

4. The appeal is taken upon matters of law.

5. The proceedings of the hearings were recorded or reported by the method of electronic recordings and are in the possession of the Clearwater County Clerk located in Orofino, Idaho. The Estate requests that the Court order that no transcript need be prepared pursuant to Idaho Rule of Civil Procedure 83(j)(2).

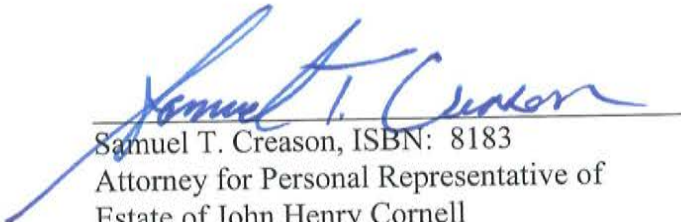
6. The statement of issues on appeal that the Estate intends to assert are as follows:

**Issue 1.** Whether the Court erred in finding that any claims to the Trust res by, through, or on behalf of John Henry Cornell abated upon the death of John Henry Cornell?

7. The above list of issues is not exhaustive and the Estate may assert other issues on appeal thereafter discovered by the Estate.

DATED this 9<sup>th</sup> day of July 2014.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
Samuel T. Creason, ISBN: 8183  
Attorney for Personal Representative of  
Estate of John Henry Cornell




**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 9th day of July, 2014, a copy of the foregoing NOTICE OF APPEAL was served by the method indicated below, and addressed to the following:

Karin Seubert  
Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, Idaho 83501

X FIRST-CLASS MAIL  
\_\_\_\_ HAND DELIVERED  
\_\_\_\_ OVERNIGHT MAIL  
\_\_\_\_ FAX TRANSMISSION (208) 746-9553  
\_\_\_\_ EMAIL *krseubert@lewiston.com*

  
\_\_\_\_  
Samuel T. Creason

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

CASE NO. CV12-277

BY VO DEPUTY

In the Matter of:

Case No. CV 2012-00277

THE REVOCABLE FAMILY TRUST  
OF MICHAEL S. CORNELL AND  
ARLIE M. CORNELL.

Appeal from the Magistrate Division of the District Court  
of the Second Judicial District for Clearwater County

Honorable Randall W. Robinson, Magistrate Judge Presiding

Theodore O. Creason, ISBN: 1563  
Samuel T. Creason, ISBN: 8183  
Creason, Moore, Dokken & Geidl, PLLC  
1219 Idaho Street, P. O. Drawer 835  
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Jones, Brower & Callery, P.L.L.C.  
1304 Idaho Street, P.O. Box 854  
Lewiston, ID 83501  
(208) 743-3591

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## PRELIMINARY STATEMENT<sup>1</sup>

This case is about the actions of Toni C. Johnson while she served as the successor trustee of The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell ("Trust"). Ms. Johnson concedes that during the over two and a half years that she served as successor trustee, she repeatedly made improper use of the Trust res for her own benefit. She also concedes that during that time she engaged in inequitable conduct in order to deprive her brother, John Cornell—a co-beneficiary—of his interest in the Trust res. Now, she argues that because John Cornell died before he could stop her from continuing in this line of conduct, any claims he held abated and there exists no judicial recourse for the heirs of John Cornell. The question before the Court is whether the Estate of John Cornell may pursue recovery of John Cornell's interest in the Trust res.

## STATEMENT OF THE CASE

### A. Nature of the Case

The Estate of John Henry Cornell comes before this Court on appeal from dismissal of its petition for supervised administration and court ordered distribution of *The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell*. The magistrate court dismissed the Petition on the grounds that the Estate's claims did not survive the death of John Henry Cornell. Petitioner appeals.

### B. Course of Proceedings

This matter comes before the Court after the conclusion of a highly irregular course of proceedings before the magistrate court. The case identified by case number CV 2012-277 was initiated through a Petition filed by John Henry Cornell on July 11, 2012. John Cornell died

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<sup>1</sup> Petitioner sets forth a verbatim copy of her brief filed in the previous appeal of this matter, any substantive change in text has been underlined.

from an apparent suicide on August 20, 2012. Ms. Johnson filed a Motion to Dismiss on September 17, 2012, arguing that the claims in John Cornell's petition abated upon his death. Ms. Johnson also argued that because John died, there existed no legitimate party in interest unless and until the Estate was substituted into the action pursuant to Idaho Rule of Civil Procedure 25(a)(1).

For reasons beyond Kareen Cornell's control, John Cornell's attorney continued to prosecute the petition in John Cornell's name, personally. In late November 2012, Ms. Cornell appeared before the Court and notified the Court that she objected to any other person acting on behalf of her late husband. While the magistrate court invited Ms. Cornell to submit briefing on pending action, it did not bring her or the Estate into the litigation. Thus, Ms. Cornell's briefing was, in effect, *amici* briefing. On February 15, 2013, this Court issued a Memorandum Opinion. In that opinion, the Court dismissed the petition filed by John Cornell, personally. However, the Court expressly invited Ms. Cornell to file claims on behalf of the Estate.

Ms. Cornell responded to the Court's invitation by filing the Estate's Petition on February 28, 2013. While many of the Estate's claims were identical to those raised by John Cornell in his August 2012 petition, the Estate also raised additional claims. The Estate's Petition alleged that Ms. Johnson (1) failed to act in conformity with the terms of the Trust; (2) breached her fiduciary duties when acting in her capacity as Trustee; (3) engaged in equitable conversion of the property belonging to John Cornell by refusing to distribute the property; and (4) was unjustly enriched by (a) misusing Trust assets for personal desires, and (b) refusing to comply with the terms of the Trust and her fiduciary duties in order to effect a distribution in her favor. The Estate sought supervised administration, court ordered distribution of the Trust, and a judgment against Ms. Johnson for injuries caused to the Trust. The Petition set forth the following legal

and equitable causes of action: (A) breach of fiduciary duty; (B) constructive trust; (C) breach of contract; (D) conversion; and (E) unjust enrichment.

No Answer has ever been filed to those allegations. Instead, Ms. Johnson filed a Motion to Dismiss the Estate's Petition on March 1, 2013. Ms. Johnson argued that the petition should be dismissed because (1) the Estate was bound by the Court's February 15, 2013, memorandum opinion, and (2) the Estate's Petition either failed to state a cause of action or stated causes of action which abated upon the death of John Cornell. Ms. Johnson based her abatement arguments on the same theory that the magistrate court adopted in dismissing Mr. Cornell's claims.

The magistrate court granted Ms. Johnson's motion on June 21, 2013. In its memorandum opinion, the court concluded that (A) all claims for breach of fiduciary duty abated, at common law and under Idaho statute, upon death; (B) the doctrine of constructive trust was inapplicable and an action under that doctrine was in tort, which abated upon death; (C) the claims for breach of contract were co-extensive with the statutory duties of a trustee and, therefore, were breach of fiduciary duty claims which abated upon death; (D) claims for equitable conversion sounded in tort and, therefore, abated upon death; and (E) claims for unjust enrichment sounded in tort and, therefore, abated upon death. The magistrate court based its ruling upon the following conclusions of law: (1) the Idaho Supreme Court Opinion of *Bishop v. Owens*, 152 Idaho 616, 619 (2012) stands for the proposition that all claims sounding in tort abate at common law upon the death of the claimant; and (2) the Idaho legislature did not abrogate that rule with the amendment of Idaho Code § 5-327, except for claims for recovery of medical expenses, out of pocket expenses, and lost wages.

The Estate filed an Appeal from the Magistrate Division of the District court on October 13, 2013. The Estate's Appeal alleged that both the common law and Idaho Code § 5-327 supported a ruling that the causes of action set forth in the Estate's Petition survived the death of John Cornell. On April 8, 2014, the District Court remanded the case back to the Magistrate Court. The District Court instructed the Magistrate Court to first determine whether Toni Johnson ought to be removed as trustee.

On May 13, 2014, Ms. Cornell filed a Motion to Remove Trustee and an Application for Appointment of Trustee seeking appointment to herself to serve as trustee. Oral arguments were heard on May 27, 2014, with regards to the remand order and Ms. Cornell's motion. In its memorandum opinion the court concluded that (A) because a request for removal was not made within the Estate's Petitioner, there existed no party with standing to request removal of Toni Johnson; (B) the Estate's claims abated upon the death of John Cornell, and (C) therefore, she did not have standing to request removal of Toni Johnson under Idaho Code § 15-7-308; and (D) it was nonsensical for the Court to order removal of Toni Johnson once the Court has found that no other beneficiaries exist.

The magistrate court based its ruling upon the following conclusions of law: (1) the Idaho Supreme Court Opinion of Bishop v. Owens, 152 Idaho 616, 619 (2012) stands for the proposition that all claims sounding in tort abate at common law upon the death of the claimant; and (2) the Idaho legislature did not abrogate that rule with the amendment of Idaho Code § 5-327, except for claims for recovery of medical expenses, out of pocket expenses, and lost wages. As set forth herein, the court's conclusions are erroneous.

### C. Statement of Facts

Michael and Arlie Cornell established The Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell ("Trust") on November 1, 1996. The Trust was established to provide for Michael and Arlie during their lifetimes, with the remainder to be distributed to their two children: Toni Johnson and John Cornell. Arlie Cornell died on November 9, 2008. Michael Cornell died on December 15, 2009. Ms. Johnson has been the sole Trustee since that time.

As a successor trustee, Ms. Johnson was to have a very limited role. Ms. Johnson's sole duty as trustee was to distribute the trust assets. Over the months and years following Michael Cornell's death, Ms. Johnson failed to distribute the Trust. Instead, she "egregiously wronged her brother during his lifetime. *Mem. Op. re Attorney Fees and Costs* 3. "Ms. Johnson acted inappropriately in bestowing the proceeds of the trust upon herself and not shar[ing] one cent with her brother." *Id.* She refused to distribute the Trust, despite John Cornell's repeated objections and pleas that she do so, in part, so that he could "pay for necessary medical care that he could not obtain without money from the trust." *Id.* at 2. John Cornell was never able to compel distribution before his death on August 20, 2012.

Ms. Johnson's discovery responses in this case substantiate the concerns and frustrations that Mr. Cornell raised in the over two and one-half years between the surviving trustor's death and Mr. Cornell's death. At her deposition, Ms. Johnson admitted that she routinely makes personal use of the real and personal property of the Trust. She lives rent-free in the home that is included in the Trust. She has commingled cash assets of the Trust with her own cash assets. She has depleted the cash assets of the Trust, with not only expenses of the Trust but also her personal expenses. To date, the only distributions that Ms. Johnson has made are the unreported distributions made through her personal use of the Trust res.

## ISSUE PRESENTED ON APPEAL

1. The issue before the Court is the survival of causes of actions regarding (a) proper administration of the Trust, and (b) proper distribution of assets to which the Trust is title owner. Under its terms, the Trust was to terminate upon the death of the surviving trustor—in this case, December 15, 2009. As successor Trustee, Toni Johnson was to distribute the Trust res “as soon as reasonably possible.” Ms. Johnson concedes that she acted inequitably: she mismanaged the Trust, she commingled assets, she used Trust funds for personal use, and she refused to distribute the Trust res, despite John Cornell’s demands. John Cornell died in August 2012. May the Estate of John Cornell pursue not only his interests in the remaining Trust property, but also claims for the diminution of that property through mismanagement by Toni Johnson?

## ARGUMENT

The Estate’s Petition raises claims against Ms. Johnson based upon conduct occurring since December 15, 2009, the date she accepted appointment as successor trustee of the Trust. The law governing survival of actions upon the death of the injured party was changed on July 1, 2010, when the amended Idaho Code § 5-327 became effective. Prior to that point in time, issues of survival upon the death of the injured party were governed by the common law. Thus, this case requires the Court to determine whether the Estate’s claims survive at common law and under section 5-327. The magistrate court granted Ms. Johnson’s motion to dismiss on the grounds that (1) under the common law, all causes of action sounding in tort abate upon the death of the injured party; and (2) under Idaho Code § 5-327(2), all causes of action sounding in tort are limited, upon the death of the injured party, to recovery for damages not sought in the Estate’s petition.

### A. Standard of Review

The magistrate court dismissed this action on a summary judgment standard, because it considered affidavits filed by the parties. *See* Idaho R. Civ. P. 56(c). An appellate Court exercises *de novo* review over a grant of summary judgment. *Constr. Mgmt. Sys., Inc. v. Assurance Co. of Am.*, 135 Idaho 680, 682, 23 P.3d 142, 144 (2001).

Summary judgment is only appropriate when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Idaho R. Civ. P. 56(c). When determining whether a genuine issue of material fact exists, the Court “liberally construes the record in the light most favorable to the party opposing the motion, drawing all reasonable inferences and conclusions in that party’s favor.” *Constr. Mgmt. Sys., Inc.*, 135 Idaho at 682, 23 P.3d at 144. If, as the result of such a liberal construction, the Court finds that reasonable persons could reach different findings or draw conflicting inferences from the evidence, the Court must deny the motion. Thus, Ms. Johnson carries the burden of proving that reasonable persons could not draw conflicting inference from the evidence, when the record is construed in a light most favorable to the Estate.

**B. The Estate’s Causes of Action Did Not Abate at Common Law.**

**1. The Estate’s Tort Claims Did Not Abate**

The Estate’s tort claims did not abate at common law, because the claims seek damages for the deprivation and diminution of a property interest. The magistrate court ruled that, at common law, every cause of action sounding in tort abates upon the death of the injured party. The court based its ruling entirely on the Idaho Supreme Court case of *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012). The magistrate court found the following language from *Bishop* dispositive in this case: “Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate.” *Id.* at 619, 272 P.3d at 1250. The magistrate court’s broad application of *Bishop* is in error. The *Bishop* Court identified the general rule regarding abatement of tort claims at common law. *Id.* While that general rule is certainly applicable to this case, it is not dispositive. The *Bishop* Court was not presented with facts that required it to analyze some of the more nuanced applications of the

abatement doctrine. The magistrate court erred in applying the general rule of *Bishop* to this case because (a) the Estate's tort claims seek redress for injury done to the decedent's property interests; (b) the Estate's tort claims are founded upon a remedial statute; and (c) the Estate's tort claims are not legal claims but rather claims in equity. As set forth below, each of these distinctions dictates a finding that the Estate's tort claims survived the death of John Cornell.

The *Bishop* Opinion does not—either by its facts or by its language—set precedent regarding abatement of causes of action Estate's claims. The *Bishop* Court was presented with facts far different from this case. First, the decedent in *Bishop* brought a legal malpractice claim, alleging that her former attorney injured her by failing to properly advise her about the consequences of a negotiated settlement with respect to subrogated interests. *Id.* at 618, 272 P.3d at 1249. Here, the Estate claims that the defendant injured John Cornell by depriving him his property (which she still retains) and, at the same time, diminishing the value of that property. Second, the decedent in *Bishop* did not rely upon a statute or equitable doctrine to identify a unique duty or standard of care; she relied upon a legal representation agreement which applied the same standard to which all Idaho attorneys are held, the Idaho Rules of Professional Responsibility. *Id.* at 620, 272 P.3d at 1251. Here, the Estate has raised tort claims based upon the remedial statutes set forth in the Idaho Code which govern the conduct of trustees, and based upon equitable doctrines. Third, the decedent in *Bishop* sought an award of money damages, not relief in the form of restoration and distribution of certain identified assets to which she believed she was entitled. *Id.* at 619, 272 P.3d at 1250. Here, the Estate seeks restoration and distribution of certain assets—the Trust res. These three factual distinctions explain why the *Bishop* Court had no need to proceed beyond a recitation of the general rule and evidence why the magistrate court erred in giving *Bishop* such a broad interpretation.



The language of the *Bishop* Opinion does not support the magistrate court's interpretation of the *Bishop* language as universal. The *Bishop* Opinion cites *Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919) as support for its general rule. *Kloepfer* makes express that which *Bishop* assumes: "As a general rule, in the absence of a statute providing otherwise, causes of action ex contractu survive, while causes ex delicto do not. **However, there are well-recognized exceptions to both branches of the rule.**" *Id.* (emphasis added). These well-recognized exceptions mandate survival of the Estate's claims.

Subsequent Supreme Court case law also conflicts with the magistrate court's interpretation. Based on *Bishop*, the magistrate court ruled that "in order for John's claims to survive his death, his claims must sound in contract, and not in tort." *Memorandum Op. re: Kareen Cornell* 10. In the January 2013 case of *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, the Supreme Court considered whether a given tort claim could be assigned after the death of the injured party, particularly in light of its opinion in *Bishop*. 154 Idaho 37, 293 P.3d 661, 667 (2013). The Court affirmed the rule from *MacLoed v. Stelle*, where it held that "'if [a tort claim] survives, it may be assigned; if not, it may not,' [the Court] also held that an 'injury [that] lessens the estate of the injured party does survive, and that is assignable.'" *Luciani*, 154 Idaho at 41, 293 P.3d at 667 (quoting *MacLoed*, 43 Idaho 64, 75, 249 P. 254, 257 (1926)). Thus, even as recent as January 2013, the Idaho Supreme Court assumed that certain tort claims survive the death of the injured party, even after *Bishop*.

**a. The Estate's tort claims did not abate because the claims seek redress for injury to property.**

One of the well-recognized exceptions to the rule of abatement of tort claims is that tort claims survive where they are actions for recovery or protection of a property interest.

The general rule is that, in addition to the causes of action arising out of contract recognized at common law, causes of action arising from torts to real and personal property survive and pass to the personal representative of the decedent, while purely personal torts do not survive in the absence of statutory provision.

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 51. Thus, in cases where the injured party alleged an injury to his property—such as the existence or amount of his interest in a trust—the claim survives. See *Barnes v. Barnes*, 135 Idaho 103, 105, 15 P.3d 816, 818 (2000) (holding that while a divorce proceeding abates upon death, “[i]f property issues are involved, the action continues solely to resolve those issues”).

Here, there exists a genuine issue of material fact as to whether Mr. Cornell held a vested property interest in the Trust res at the time of his death. Upon accepting appointment as successor trustee, Ms. Johnson’s obligations to the Trust and Mr. Cornell (as the beneficiary) were clear.

On the death of the surviving Trustor, the Trust shall terminate and the Trustee shall, as soon as reasonably possible, divide the net income and principal remaining in the Trust into two (2) equal shares and distribute them to the following beneficiaries: TONI C. JOHNSON and JOHN H. CORNELL.

*Trust* § 4.03. However, the very next provision of the Trust gives rise to much of the confusion in this matter. The Trust proceeds to set forth the terms for distribution in the event that one or both of the Trustors’ children should die.

If any child . . . should die prior to the above distribution, then the Trustee shall distribute all of such deceased child’s share to his or her surviving issue in equal shares. . . . If there is no surviving issue, then all of the deceased child’s share of the Trust Estate shall be added to the shares set aside for the . . . other living child . . . .”

*Trust* § 4.03(a). Ms. Johnson argued that because John Cornell died before he could compel her to distribute the Trust res, any interest he held in the Trust died with him; thus, she should receive the entirety of the Trust res. The Estate maintains that John Cornell’s interest in the

Trust res vested upon the death of Michael Cornell. The Estate also argues that even if John Cornell's interest did not vest upon the death of Michael Cornell, it vested at the point in time where equity would presume proper distribution because "equity regards that as done which ought to be done." *See First Sec. Bank of Idaho, Nat. Ass'n v. Rogers*, 91 Idaho 654, 657, 429 P.2d 386, 389 (1967).

The magistrate court ruled that because John Cornell died prior to distribution, he could not have obtained a vested interest in the Trust res.<sup>2</sup> *See Memorandum Op. re: Kareen Cornell* 12. The magistrate court did not provide any discussion or analysis regarding ambiguity within the document or the intent of the Trustors. The magistrate court did not provide any discussion or analysis regarding the Estate's arguments that, at the very latest, John Cornell's interest vested under equity. These omissions are of particular import because the magistrate court later found that Ms. Johnson acted against the intent of the Trustors. *See Memorandum Op. re: Attorney Fees and Costs* 3. Therefore, the magistrate erred when it ruled that, as a matter of law, John Cornell did not hold a vested interest.

**b. The Estate's tort claims did not abate because the claims are founded upon a remedial statute.**

The survivability of this action is further supported by the fact that the claims arise pursuant to a remedial statute. In *Bishop*, the decedent merely relied on a common law duty. Here, the Estate seeks recovery based, in part, upon a trustee's breach of fiduciary duty, as defined in Idaho Code §§ 15-7-101 through 15-7-601. "A cause of action that is founded on a remedial statute . . . survives the death of the party possessing the cause of action." 1 Am. Jur.

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<sup>2</sup> The magistrate court was not explicit about why it rejected the Estate's arguments regarding continuing jurisdiction over administration of the Trust. It appears, however, that the magistrate court rejected that argument based upon the court's finding that Toni Johnson was the only remaining entity with an interest in the Trust.

2d *Abatement, Survival, and Revival* § 59. A statutory right exists to hold a trustee liable for her conduct in the same manner as a personal representative of an estate. Idaho Code § 15-7-306 cmt. Liability for a trustee and for a personal representative as to a beneficiary focuses upon injury to the estate or the trust res, rather than the person. See *id.*; Idaho Code § 15-3-808.

Therefore, the Estate's breach of fiduciary duty claims did not abate.

c. **The Estate's tort claims did not abate because the claims are not legal claims, but claims in equity.**

Finally, the survivability of this action is further supported by the fact that it seeks recovery through equitable causes of action. In *Bishop*, the only cause of action was the legal theory of malpractice. Here, the Estate has raised several equitable doctrines entitling it to relief. "In equity, abatement signifies a present, temporary suspension of further proceedings in a suit because of want of proper parties. It is an interruption or suspension of a suit, the equivalent of a stay of proceedings, and the suit may be revived and proceed to its regular determination." 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 1 (footnotes omitted).

The principle that a cause of action expires with the death or disability of a party generally does not apply to suits in equity; **equitable remedies exist to the same extent in favor of and against executors and administrators** as they do against the decedent, as long as the court can continue to grant effective relief in spite of the death. **One of the main reasons for this stance for suits in equity is that such suits primarily pertain to property rights.**

1 Am. Jur. 2d *Abatement, Survival, and Revival* § 60 (footnotes omitted) (emphases added).<sup>3</sup>

The magistrate court erred in ruling that the claims of conversion, constructive trust, and unjust enrichment abated under *Bishop*. See *Memorandum Op. re: Kareen Cornell* 13-15.

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<sup>3</sup> See also *Barnes Coal Corp. v. Retail Coal Merchants Ass'n*, 128 F.2d 645, 649 (4th Cir. 1942); *Glojek v. Glojek*, 254 Wis. 109, 115, 35 N.W.2d 203, 206 (1948); *Hughey v. Mooney*, 282 S.C. 597, 602, 320 S.E.2d 475, 477 (Ct. App. 1984); *Miller v. Hayman*, 766 So. 2d 1116, 1118 n.1 (Fla. Dist. Ct. App. 2000)

**Conversion.** The Estate seeks recovery under the equitable doctrine of conversion. “The act of wrongfully and permanently depriving someone of his property establishes conversion.” *In re Pangburn*, 154 Idaho 233, 296 P.3d 1080, 1085 (2013). These are the exact elements alleged by the Estate. As set forth above, a genuine issue of material fact exists regarding whether John Cornell held a vested interest in the Trust res at the time of his death. “At common law, the right to bring an action for the conversion of goods in the lifetime of the decedent owner generally survived to the personal representative . . . .” 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 76. The consequence of the magistrate’s ruling evidences the reason for the equitable exception to the rule of abatement: if the Estate’s claims did not survive John Cornell’s death, then Ms. Johnson will be allowed to enjoy property which she did not own, and which she now possess only as a result of her inequitable conduct. Such a result is patently inequitable. The Estate’s claims for redress through the doctrine of conversion did not abate.

**Constructive Trust.** The Estate seeks recovery under the the equitable doctrine of constructive trust. It is “the fundamental rule of equity that equity regards that as done which ought to be done.” *See First Sec. Bank of Idaho*, 91 Idaho at 657, 429 P.2d at 389 (discussing basis of doctrine of equitable conversion). Ms. Johnson ought to have distributed the Trust res long before the death of John Cornell. It is undisputed that Ms. Johnson engaged in inequitable conduct by retaining legal title to the assets of the Trust in the name of the Trust. “When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.” TRUST, Black’s Law Dictionary (9th ed. 2009), trust (internal quotation marks and citation omitted); *see also Hanger v. Hess*, 49 Idaho 325, 328, 288 P. 160, 161 (1930). The doctrine of constructive

trust is a description of the nature by which a wrongdoer holds the property of another; the court deems that property as already belonging to the injured party at some earlier point in time.

The court's ruling regarding abatement is erroneous. While the Idaho Supreme Court has not expressly addressed the issue of survival of constructive trust claims at common law, it presumed their survival in *Brasch v. Brasch*, 55 Idaho 777, 47 P.2d 676, 678 (1935). The Estate's claims for redress through the doctrine of constructive trust did not abate.

The magistrate court also supported its grant of summary judgment against this claim by ruling that a constructive trust could not have arisen in this case as a matter of law: "As this case already addresses a legal trust, there is no necessity to resort to the legal fiction of a constructive trust." *Memorandum Op. re: Kareen Cornell* 13. The Estate is unaware of any authority argued by the parties (or otherwise existing at law or in equity) supporting a finding that the doctrine of constructive trust is unavailable in cases involving express trusts. The constructive trust in which the Trust held John Cornell's property is distinct from the actual trust arrangement that existed prior to the constructive trust arising. The doctrine of constructive trust is particularly applicable to the facts of this case. Ms. Johnson ought to have distributed the Trust res as soon as reasonably practicable when the Trust automatically terminated upon the death of Michael Cornell. Ms. Johnson acted inequitably by retaining the Trust res in name of the Trust, while using it for her own benefit. Reasonable persons could reach different findings or draw conflicting inferences from the evidence with respect to whether a constructive trust arose based upon (i) the extended period of time between the death of Michael Cornell and the death of John Cornell; and (ii) the undisputed inequitable conduct by Ms. Johnson. Therefore, the magistrate court erred in granting summary judgment on this claim.

**Unjust Enrichment.** The Estate seeks recovery under the equitable doctrine of unjust enrichment. “Unjust enrichment occurs where [offending party] receives a benefit which would be inequitable to retain without compensating the [injured party] to the extent that retention is unjust.” *Vanderford Co., Inc. v. Knudson*, 144 Idaho 547, 557, 165 P.3d 261, 271 (2007). The damages available to the claimant on an unjust enrichment claim is the value of the amount by which the offending party was unjustly enriched. *Barry v. Pac. W. Const., Inc.*, 140 Idaho 827, 834, 103 P.3d 440, 447 (2004). Like constructive trust, unjust enrichment is an equitable doctrine that seeks to return to the injured party those amounts which were due to him or her in equity; amounts which equity deems property of the injured party. If the Estate prevails on its unjust enrichment claim, it will have established that John Cornell held an equitable interest in property prior to his death. The Estate has a statutory duty to recover property of the decedent and distribute it in probate. *See* Idaho Code § 15-3-709. The Estate’s claims for redress through the doctrine of unjust enrichment did not abate.

## **2. The Estate’s Breach of Contract Claims Did Not Abate**

As with the tort claims, the magistrate court relied exclusively on *Bishop* to support its ruling of abatement of the contract claims. The court interpreted *Bishop* as standing for the proposition that where the duties placed upon the defendant could be found at law, all contract claims should be re-characterized as tort claims. *Memorandum Op. re: Kareen Cornell* 13-14. The magistrate court found that the Estate failed “to point out any way in which the Trust instrument imposes any duties upon Toni [Johnson] that are not also imposed by the Probate Code.” *Id.* As a result, the magistrate court held the contract claims were actually tort claims and, therefore, abated upon the death of John Cornell. The court ruling was erroneous because

- (a) the analysis in *Bishop* was in response to a relationship that was not contractual in nature; and
- (b) the Estate's contract claims identify contractual duties which do not exist at law.

The magistrate court's reliance upon *Bishop* to re-characterize the Estate's contract claims was in error. In *Bishop*, the question before the court was whether the decedent could pursue a legal malpractice action through breach of contract claims. *Bishop*, 152 Idaho at 620, 272 P.3d at 1251. The plaintiff's theory in *Bishop* was that it could either sue for legal malpractice, which sounded in pure tort, or for breach of the legal representation agreement, which sounded in contract. *Id.* The *Bishop* Court actually held this theory correct. *See id.* The reason the contract claims failed in *Bishop* is that the plaintiff had not alleged breach of a specific term within the contract, but instead alleged breach of the term referencing the common law duties owed by every attorney to that attorney's clients. *Id.* at 621, 272 P.3d at 1252. The *Bishop* Court explained that if such a provision were enough to transform the pure tort action of legal malpractice into a breach of contract action, there would exist "a per se breach of contract action in every legal malpractice action." *Id.* The relationship between attorney and client is not contractual in nature. *Id.* at 620, 272 P.3d at 1251. The Estate's action is far different than that in *Bishop*.

The relationship between a trustee and a beneficiary is contractual in nature. "A trust is not itself a separate legal entity that can own property; rather, it is a relationship having certain attributes." *In re Thompson*, 454 B.R. 486, 492 (Bankr. D. Idaho 2011). "A trust creates a fiduciary relationship in which the trustee is the holder of legal title to the property subject to the beneficial interest of the beneficiary." *DBSI/TRI V v. Bender*, 130 Idaho 796, 808, 948 P.2d 151, 163 (1997). The scope and nature of that relationship is defined by the terms of the trust, i.e. the



contract. A trustee's fiduciary duties and contractual duties are intertwined, yet distinguishable.

The Restatement (Third) of Trusts § 2 defines a trust as

... a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of ... one or more persons, at least one of whom is not the sole trustee.

The Estate has identified specific provisions within the Trust document—the trust contract—which Ms. Johnson breached.

- 4.03 & 4.04: The Trust terminates automatically upon the death of the surviving Trustor and the successor Trustee is to distribute the property “as soon as reasonably possible.”
- 5.01: The only property which may be retained in the Trust after the death of the surviving Trustor is property productive of income.
- 8.02: The successor Trustee shall render an accounting from time to time.

The Estate alleges that Ms. Johnson breached these contractual provisions through her conduct. These provisions set forth specific duties outside the general fiduciary duties found in the probate code. There exist clear and distinct terms in the trust contract regarding conduct after the death of Michael Cornell. The Estate's allegation that Ms. Johnson breached those terms is far different than a general allegation that she did not administer the trust expeditiously in accordance with Idaho Code § 15-7-301. The Estate's allegation that Ms. Johnson breached the trust contract by retaining non-income producing property in the Trust, identifies a duty that cannot be found anywhere in statute. A breach of contract claim is distinct from a breach of fiduciary duty claim. A breach of contract claim focuses on the trustee's failure to adhere to the terms of the trust document; a breach of fiduciary duty claim focuses on the trustee's failure to act in accordance with the standard of conduct required of the trustee under statutory and common law. To argue that no contractual claim may lie against the trustee is to argue that the terms of the trust document have no substance.

**C. The Estate's Causes of Action Did Not Abate Under Idaho Code § 5-327(2).**

The magistrate court held that the Estate's causes of action arising after July 1, 2010 abated pursuant to Idaho Code § 5-327(2). It based this holding on its interpretation of subsection 5-327(2) as allowing survival in property damage cases only for recovery for medical expenses, other out-of-pocket expenses, and loss of earnings. The court's error was the result of construing the language of the statute in such a rigid manner as to produce an absurd result upon application.

While the Estate's causes of action survived John Cornell's death under the common law, the Idaho legislature made survival explicit in its enactment of Idaho Code § 5-327(2):

A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person and as a result of the wrongful act or negligence. Such action shall be commenced or, if already commenced at the time of the death of the injured person, shall be thereafter prosecuted by the personal representative of the estate of the deceased person or, if there be no personal representative appointed, then by those persons who would be entitled to succeed to the property of the deceased person according to the provisions of section 5-311(2)(a), Idaho Code.

The first sentence of subsection 327(2) states that tort causes of action for "personal injury or property damage" do not abate upon the death of the injured party. The second sentence then contains a proviso limiting recovery to medical expenses, other out-of-pocket expenses, and loss of earnings. Because this proviso does not expressly limit itself to the antecedent of "personal injury" claims, the magistrate court concluded that the proviso also applies to causes of action for property damage.

The proper application of Idaho Code § 5-327(2) is revealed through the syntactic and contextual canons of statutory interpretations. The following principles of statutory interpretation should be employed here:

1. the objective is to derive the intent of the legislature;
2. language should be interpreted in the context of the entire document;
3. language should be given its plain, usual, and ordinary meaning; and
4. language is to be interpreted in accord with common sense and reason.

See *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011) and *Smith v. Dep't of Employment*, 100 Idaho 520, 522, 602 P.2d 18, 20 (1979). The issue before this Court is whether the legislature intended the second-sentence proviso to apply to both personal injury actions and property damage actions.

The subordinate clause at the end of the second sentence supports an interpretation which limits the proviso to personal injury cases. The subordinate clause restricts recovery in the listed areas to those damages which resulted from the wrongful act or negligence; and incurred "prior to the death of the injured person." The limitation of damages to those incurred prior to the death of the injured person evidences the legislature's intent to limit recovery in personal injury actions for economic harms suffered, excluding damages such as pain and suffering. A property damage action, by its nature, seeks only recovery economic harm suffered.

Interpreting the listed areas of recovery in accord with common sense and reason, the listed areas for recovery support an interpretation which limits the proviso to personal injury cases. It is the rare property damage case where "medical expenses" are incurred. It is also rare to have a property damage case where the plaintiff seeks "loss of earnings." Those two areas are, however, common in personal injury actions. Not only do these areas of recovery counsel against applying the proviso to the property damage case, they support allowing full recovery in

property damage cases. In one sense, every property damage claim could be categorized as a claim for recovery of out of pocket expenses.

The magistrate courts rigid interpretation of Idaho Code § 5-327(2) was in error. The subsection, however, provides a sensible and reasonable result when interpreted through the syntactic and contextual canons of statutory interpretations. The Estate asks this Court to reverse the magistrate court's grant of summary judgment and rule that the second sentence proviso in the subsection does not constitute a limitation on property damage actions.

### CONCLUSION

Both the common law and Idaho Code § 5-327 support a ruling that the causes of action set forth in the Estate's Petition survived the death of John Cornell. The Estate has raised several claims in law and equity seeking recovery of that property in which John Cornell held an interest at the time of his death. The property interests of a decedent do not die with that decedent. Neither do the decedents claims for damage to his property done by others. Both the property interests and the claims for property damage pass to his Estate, where the interests may be pursued on behalf of the beneficiaries of the Estate. Ms. Johnson has conceded that she acted inequitably. Neither law nor equity allows her to continue her inequitable conduct by now depriving John Cornell's heirs of his property. The Estate asks this Court to reverse the magistrate court's ruling and remand the case for further proceedings.

DATED this 9th day of July, 2014.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
\_\_\_\_\_  
Samuel T. Creason, ISBN: 8183  
Attorneys for Appellant

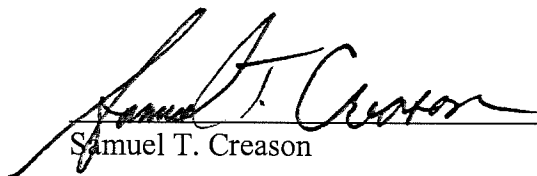
**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that a copy of the foregoing APPELLANT'S BRIEF was served by the method indicated below and addressed to the following:

Karin Seubert  
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<u>     </u>	HAND DELIVERED
<u>     </u>	OVERNIGHT MAIL
<u>     </u>	FAX TRANSMISSION

DATED this 9<sup>th</sup> day of July, 2014.

  
\_\_\_\_\_  
Samuel T. Creason

FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 JUL 14 PM 4:51

CASE NO. W2012-277

BY SD DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE  
M. CORNELL.

CASE NO. CV2012-277

CLERK'S TRANSMITTAL OF  
COURT FILE AND  
CERTIFICATE OF APPEAL  
TO DISTRICT COURT

TO: The District Court of the Second Judicial District, in and for the County of  
Clearwater.

Transmitted in the case file in the above captioned case:

APPEAL FROM: Magistrate Division.

ORDER OR JUDGMENT APPEALED FROM: Final Judgment RE: Remand Order  
and Memorandum Opinion RE: Remand Order.

HEARING HELD:

APPEALED BY: The Estate of John Henry Cornell, acting through its personal  
representative, Kareen Cornell.

NOTICE OF APPEAL FILED: July 10, 2014.

NOTICE OF CROSS-APPEAL FILED: No.

ORDER OR JUDGMENT CROSS-APPEALED FROM: None.

ATTORNEY FOR APPELLANT: Samuel T. Creason, CREASON, MOORE,  
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ATTORNEY FOR RESPONDENT: Karin Seubert, JONES, BROWER &  
CALLERY, P.O. Box 854, Lewiston, ID 83501

CLERK'S TRANSMITTAL OF COURT FILE  
AND CERTIFICATE OF APPEAL TO DISTRICT  
COURT

OTHER ATTORNEYS: None.

MOTION FOR TRIAL DE NOVO: No.

REQUEST FOR TRANSCRIPT: No.

APPELLATE FEE PAID: Yes .

DATED this 14<sup>th</sup> day of July, 2014.

CARRIE BIRD  
Clerk of the District Court

By Bali Dey  
Deputy Clerk



#### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, on the 14 day of July 2014 to:

Samuel T. Creason  
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Lewiston, ID 83501

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Lewiston, ID 83501

CARRIE BIRD  
Clerk of the District Court

By Bali Dey  
Deputy Clerk



CLERK'S TRANSMITTAL OF COURT FILE  
AND CERTIFICATE OF APPEAL TO DISTRICT  
COURT

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
2014 JUL 22 AM 11:34  
CASE NO. CV2012-277  
BY BP DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE REVOCABLE FAMILY TRUST  
OF MICHAEL S. CORNELL AND  
ARLIE M. CORNELL

)  
)  
)  
)  
)  
)

CASE NO. CV 2012-277

SCHEDULING  
ORDER

Based upon an appropriate showing that a transcript was not requested  
and is not necessary in the appeal of the above entitled case,


AND that appellant filed the appellant's brief on July 10, 2014,

IT IS ORDERED that the respondent's brief shall be filed by August 7,  
2014, and,

The appellant shall file a reply brief by August 28, 2014.

IT IS FURTHER ORDERED that oral argument on appeal shall be held  
on the 19<sup>th</sup> day of September, 2014 at the hour of  
10:00 am/pm in the District Courtroom of the Clearwater County  
Courthouse, Orofino, Idaho.

DATED this 22<sup>d</sup> day of July, 2014.

  
Michael J. Griffin  
District Judge



# CERTIFICATE OF SERVICE

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that on this 23<sup>rd</sup> day of July, 2014, I served a true and correct copy of the foregoing Scheduling Order by mail or fax to:

Samuel T. Creason  
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1219 Idaho Street  
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\_\_\_\_ Fax

Karin Seubert  
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Carrie Bird, Clerk of Court

By: Bethi Baker  
Deputy Clerk



FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

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)  
)  
)  
)

Case No. CV 2012-00277

CASE NO. CV12-277

BY D. DEPUTY

**RESPONDENT'S BRIEF**

---

Appeal from the Magistrate Division of the District Court  
of the Second Judicial District for Clearwater County

---

Honorable Randall W. Robinson, Magistrate Judge Presiding

Counsel for Appellant

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## I. STATEMENT OF CASE<sup>1</sup>

### A. NATURE OF THE CASE

This action involves a dispute over the administration of a trust. One of the trust beneficiaries, John Cornell, filed a petition seeking relief against his sister in her capacity as trustee of the subject trust. Shortly thereafter, Mr. Cornell died. His Petition was dismissed after Mr. Cornell's death. Subsequently, his estate filed a separate petition raising claims related to the trust administration. The Magistrate Court dismissed the Estate's petition. The Estate appealed the original dismissal of the Estate's petition, which the District Court remanded on issues unrelated to the abatement claim. On remand, the Magistrate Court addressed the District Court's concerns and affirmed its prior dismissal based upon abatement. The Estate now appeals. The question before the Court is whether Mr. Cornell's death abates the Estate's claims related to the trust.

### B. COURSE OF PROCEEDINGS AND FACTUAL BACKGROUND

Given the highly unusual posture of this proceeding, the factual background and course of the proceedings overlap to such a degree that it is appropriate to discuss both together.

#### ***Background***

Michael S. Cornell and Arlie M. Cornell established the Revocable Family Trust of Michael S. Cornell and Arlie M. Cornell on November 1, 1996. *Petition for Supervised Administration and Court Ordered Distribution of Trust* at ¶¶ 3.1, 3.4, Exh. A (said Exhibit hereinafter referred to as "Trust"). Through said Trust, Mr. and Mrs. Cornell named their two children, Toni C. Johnson and John H. Cornell, as the beneficiaries of the trust upon Mr. and

---

<sup>1</sup> Toni Johnson has adopted the same approach as the Estate in its Appellant's Brief of submitting a nearly verbatim copy of her brief filed in the previous appeal with any substantive additions in text underlined. Portions not relevant to the current appeal have been stricken.

Mrs. Cornell's deaths. *Id.* at § 4.03 of Exh. A. On August 6, 2009, Michael S. Cornell as surviving grantor and trustee named Toni C. Johnson as sole trustee/successor trustee. *Id.* at Exh. B.

Arlie M. Cornell died on November 9, 2008 and Michael S. Cornell died on December 15, 2009. *Id.* at ¶¶ 3.4, 3.6.

***Litigation Concerning Cornell Revocable Living Trust***

On July 11, 2012, John H. Cornell filed a *Petition for Supervised Administration and Removal of Trustee*, which originally initiated this proceeding. *Id.* at ¶¶ 2.3, 3.9.

John H. Cornell died on or around August 20, 2011 leaving no issue. *Id.* at ¶ 3.10.

Respondent Toni C. Johnson filed a *Motion to Dismiss* on September 17, 2012 seeking to dismiss the *Petition for Supervised Administration and Removal of Trustee* on the basis that the claims of John H. Cornell were extinguished by his death. Said Motion was granted on February 15, 2013.

Margaret Watkins, the former temporary personal representative then as a self-identified "interested person," appealed. The District Court subsequently determined that Margaret Watkins lacked standing to pursue claims of John Cornell against Toni Johnson or the Cornell Family Trust. She has not participated in the proceedings since that time.

On February 26, 2013, Kareen Cornell as then personal representative of the Estate of John H. Cornell and as his surviving spouse, filed a *Petition for Supervised Administration and Court Ordered Distribution*. On March 4, 2013, Respondent filed a second Motion to Dismiss. On July 21, 2013, the Magistrate Court dismissed the Estate's Petition on the basis of abatement.

The Estate then appealed said decision to the District Court. The District Court considered said appeal concurrent to the appeal pursued by Margaret Watkins. The District

Court issued its *Order Remanding Case* and *Order RE: Appeal* on April 8, 2014, which remanded the case to Magistrate Court for further ruling on the request to remove Toni Johnson as trustee. *Id.* On remand, the Magistrate Court denied the request to remove Toni Johnson as trustee and reaffirmed its prior dismissal on grounds of abatement. *Memorandum Opinion re: Remand Order* entered June 16, 2014. The Estate now appeals that decision.

## II. ARGUMENT

- A. The Estate's claims against Respondent abated upon the death of John Cornell based upon the application of Idaho Code § 5-327(2).

The Estate asserts that the Magistrate Court erred in dismissal of its tort claims based on application of *Bishop v. Owens*, 152 Idaho 616, 272 P.3d 1247 (2012), to this case. *Appellant's Brief* at 6-9. The Magistrate Court relied upon the *Bishop* decision to conclude that the general rule requires that claims sounding in tort do not survive the claimant's death. *Memorandum Opinion re: Kareen Cornell* at 9-12. The Estate contends that the Magistrate Court misapplied the *Bishop* decision. As discussed further below, the Magistrate Court did not err in its application of the *Bishop* decision.

In *Bishop*, the Idaho Supreme Court discussed Idaho abatement law as follows:

The abatement rule holds that in the absence of a legislative enactment addressing the survivability of a claim, the common law rules govern. Under the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort abate.

... The scope of an attorney's contractual duty to a client is defined by the purposes for which the attorney is retained. Breach of an attorney's duty is negligence in tort. The contract basis of legal malpractice actions is the failure to perform obligations specified in the written contract. Thus, under the abatement rule, breach of duty is an action in tort, not contract; that is, unless an attorney foolhardily contracts with his client guaranteeing a specific outcome in the litigation or provides for a higher standard of care in the contract, he is held to the standard of care expected of an attorney. Breach of that duty is a tort.

... [T]he contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct. If an attorney and client

want to provide for a higher standard of care, they may do so by express language in the contract. Here, the standard of care in the contract is essentially the same as in any attorney-client relationship. Because this claim sounds in tort, it abated upon [the client's] death.

*Bishop v. Owens*, 152 Idaho 616, 620-21, 272 P.3d 1247, 1251-52 (2012) (citations omitted).

Similar to the attorney-client relationship at issue in *Bishop*, the contours of the duties owed by a trustee to trust beneficiaries are defined by the Uniform Probate Code and Principal and Income Act. Here, the Trust contains no greater requirements than are set forth in said statutes. Therefore, the common law rule of abatement applies.

Because a breach of fiduciary duty arises in tort, it abates upon the injured person's death under the common law. As such, the Estate's breach of fiduciary duty claim is abated unless a statute precludes dismissal.

The statutory section that governs the survivability of negligence claims is Idaho Code Section 5-327(2), which was amended in 2010 with the amendment taking effect on July 1, 2010. The Magistrate Court correctly concluded that the Estate's claims are outside of the scope of Idaho Code Section 5-327(2). See *infra* § II(H).

As such, the Estate's negligence claims abated upon John H. Cornell's death and no reversible error has been shown. The Magistrate Court's dismissal should be affirmed.

B. There is no exception to the abatement rule for torts for injury to property.

The Estate argues that the Magistrate Court erred when it rejected its argument that an exception to the general rule of abatement exists where damages are sought for injury to property. *Appellant's Brief* at 9-11. This issue was raised below and addressed by in the Magistrate Court's decision as follows:

Kareen seeks to distinguish *Bishop* by relying on several Am. Jur. Cites. Kareen argues that the survival of an action depends on the nature of the interest affected. Because property of the Trust is involved, as opposed to physical injury, the claim cannot be abated. 1 Am.Jur. 2d *Abatement, Survival and Revival* § 51. ...

While Kareen correctly sets forth these principles, she provides no explanation as to how they are consistent with *Bishop*. The Supreme Court in *Bishop* did not examine whether the claims were equitable or torts done to persons or to property in determining whether the joint contract and tort action survives the death of the party. ... As Kareen's claims are in the nature of torts, Kareen's claims are abated by John's death. Therefore, Kareen's arguments are rejected.



*Memorandum Opinion re: Kareen Cornell* at 15-16.

The Estate argues that the purported exception to the general abatement rule for cases for injury to property is “[o]ne of the well-recognized exceptions” under Idaho law. *Appellant’s Brief* at 9. In support of this “well-recognized exception,” Mrs. Cornell cites to the Idaho cases of *Barnes v. Barnes*, 135 Idaho 103, 15 P.3d 816 (2000), and *First Sec. Bank of Idaho, Nat. Assn’n v. Rogers*, 91 Idaho 654, 429 P.2d 386 (1967). See *Appellant’s Brief* at 9, 10. Said cases do not stand for the proposition that such an exception has been recognized under Idaho law.

The *Barnes* case was a divorce action where the husband died during the pendency of an appeal after entry of an interlocutory divorce. There, the surviving wife sought to “posthumously reunite the parties based on a procedural flaw in the motion for summary judgment.” *Id.* at 107, 15 P.3d at 820. The *Barnes* decision stands for the limited principle that where a divorced spouse dies prior to resolution of the division of community property and debts, the resolution of said division of property survives. *Id.* Said case does not discuss nor recognize any exception to the abatement rule outside of a divorce proceeding.

The *Rogers* case was an interpleader action where a dispute arose between three creditors over funds related to a contract dispute. 91 Idaho at 655, 429 P.2d at 387. The quote relied upon by Appellant, “equity regards that as done which ought to be done,” was part of a discussion of the doctrine of equitable conversion. 91 Idaho at 657, 429 P.2d at 389; *Appellant’s Brief* at 10. Said case does not discuss nor recognize any exception to the abatement rule.

A review of Idaho case law finds no other cases that recognize or create an exception to the general abatement rule discussed in *Bishop v. Owens*. See *infra* II(A).

For these reasons, no reversible error has been shown, and the Magistrate Court’s dismissal should be affirmed.

- C. There is no exception to the abatement rule for claims based upon a remedial statute.

The Estate argues that the Magistrate Court erred when it rejected its argument that an exception to the general rule of abatement exists where damages are sought upon a remedial statute. *Appellant's Brief* at 11-12. This issue was raised below and addressed by in the Magistrate Court's decision as follows:

Kareen seeks to distinguish *Bishop* by relying on several Am. Jur. Cites. ... Kareen also argues that the claims under the Probate Code survive because "(a) cause of action that is founded on a remedial statute survives the death of the party possessing the cause of action." 1 Am.Jur. 2d *Abatement, Survival, and Revival* § 59.

While Kareen correctly sets forth these principles, she provides no explanation as to how they are consistent with *Bishop*. The Supreme Court in *Bishop* did not examine whether the claims were equitable or torts done to persons or to property in determining whether the joint contract and tort action survives the death of the party. Nor did the Supreme Court analyze whether the rules of professional conduct are remedial in nature for purposes of surviving the party's death. As Kareen's claims are in the nature of torts, Kareen's claims are abated by John's death. Therefore, Kareen's arguments are rejected.

*Memorandum Opinion re: Kareen Cornell* at 15-16.

Appellant relies upon a treatise, 1 Am. Jur. 2d *Abatement, Survival and Revival* § 59, to support the position that a cause of action founded upon a remedial statute does not abate upon the injured party's death. The Estate cites to no Idaho authority to support said broad principle, which is contrary to the principles established in the *Bishop* decision.

The Estate further relies upon Idaho Code Sections 15-7-306 and 15-3-808 in support of its position that liability for a trustee to a beneficiary focuses upon injury to the estate or the trust res, as opposed to the person. *Appellant's Brief* at 12. Said statutory provisions are essentially identical with one another except that I.C. 15-7-306 applies to trustees and I.C. 15-3-808 applies to personal representatives of decedent's estates.

Specifically, Idaho Code Section 15-7-306(b) provides that "[a] trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts

committed in the course of administration of the trust estate only if he is personally at fault.” A review of Idaho case law finds no cases analyzing this statutory section that support an exception to the general rule of abatement for cases pursued under a remedial statute. Of the two found reported decisions citing to I.C. 15-7-306, the *Dennett v. Kuenzli* decision, 130 Idaho 21, 936 P.2d 219 (Ct.App. 1997), confirms that a trustee’s assignment of an option contract from himself personally to himself as trustee does not render the option contract inoperable, and the *Kolouch v. First Sec. Bank* decision, 128 Idaho 186, 911 P.2d 779 (Ct.App. 1996), upholds an award of extraordinary costs to the moving party in a removal action. Neither case is applicable here, nor supports the conclusion that an exception to the general rule of abatement exists where damages are sought upon a remedial statute.

For these reasons, no reversible error has been shown, and the Magistrate Court’s dismissal should be affirmed.

D. The Magistrate Court correctly considered and applied the law in rejecting the Estate’s conversion claim.

The Estate seeks recovery under the equitable doctrine of conversion. *Appellant’s Brief* at 12-13. The Magistrate Court rejected the Estate’s conversion claim concluding that the conversion claim are in the nature of torts, thus abated by Mr. Cornell’s death. *Memorandum Opinion re: Kareen Cornell* at 15-16.

Appellant cites to no case law or statutory authority in support of her position that the Estate now can pursue said conversation claim after John Cornell’s death, but instead relies upon a treatise, 1 Am. Jur. 2d *Abatement, Survival and Revival* § 59, without further authority or relationship to Idaho law.

For these reasons, no reversible error has been shown, and the Magistrate Court’s dismissal should be affirmed.

E. The Magistrate Court correctly considered and applied the law in rejecting the Estate's constructive trust claim.

The Estate seeks recovery under the equitable doctrine of constructive trust. *Appellant's Brief* at 13-14. The Magistrate Court rejected the Estate's constructive trust claim concluding that the Idaho Probate Code supplants equitable considerations and that the circumstances necessitating creation of a constructive trust meets the definition of a tort. *Memorandum Opinion re: Kareen Cornell* at 12-13.

"A constructive trust arises where legal title to property has been obtained through actual fraud, misrepresentations, concealments, taking advantage of one's necessities, or under circumstances otherwise rendering it unconscionable for the holder of legal title to retain beneficial interest in the property." *Witt v. Jones*, 111 Idaho 165, 168, 722 P.2d 474, 477 (1986) (citing *Davenport v. Burke*, 30 Idaho 559, 167 P. 481 (1917)). A "constructive trust arises from the legal title holder's wrongful actions and not from any intent to create a trust." *Snider v. Arnold*, 153 Idaho 641, 289 P.3d 43 (2012) (citing *Davenport v. Burke*, 30 Idaho 599, 608, 167 P. 481, 483 (1917)).

The Magistrate Court concluded that the Estate's constructive trust claim is a tort. *Memorandum Opinion re: Kareen Cornell* at 12 (citing *Bishop v. Owens*, 152 Idaho 616, 619-20, 272 P.3d 1247, 1249-50 (2012)) ("Kareen requests a constructive trust to address the civil wrong, the breach of duties Toni owed to John. As a cause of action sounding clearly in tort, Kareen's request for a constructive trust must be rejected as abated.").

The Estate asserts that the Idaho decision of *Brasch v. Brasch*, 55 Idaho 777, 47 P.2d 676 (1935) holds that the survival of constructive trust claims is presumed. The *Brasch* case involved a dispute over whether a statute of limitations had run prior to a decedent's death. *Id.* The Court concluded that the statute of limitations for the disputed claim had run during the

decedent's lifetime, therefore the plaintiff's demand was barred by the statute of limitations. *Id.* at 780, 47 P.2d at 679. The case discussed the probate statute then in effect, which read: "If a person entitled to bring an action die before the expiration of the term limited for the commencement thereof, *and the cause of action survive*, an action may be commenced by his representatives, after the expiration of that time, and within one year from his death[.]" *Id.* at 679, 47 P.2d at 678 (I.C. A., sec. 5-231) (emphasis added). The statute in question recognizes the question of abatement by conditioning the tolling of a statute of limitations only where "the cause of action survive[s]." It does not recognize a presumption, instead a condition precedent.

The Estate argues that "Ms. Johnson ought to have distributed the Trust res as soon as reasonably practicable when the Trust automatically terminated upon the death of Michael Cornell. Ms. Johnson acted inequitably by retaining the Trust res in the name of the Trust, while using it for her own benefit." As the Magistrate Court previously concluded in its *Memorandum Opinion* dated February 15, 2013, "[t]he constructive trust argument is indistinguishable from [the Estate's] arguments regarding breaches of fiduciary duties."

The Estate has provided no authority or explanation to explain the distinction it is asserting, nor to show reversible error in rejecting its constructive trust claim. Therefore, the Magistrate Court's dismissal should be affirmed.

F. The Magistrate Court correctly considered and applied the law in rejecting the Estate's unjust enrichment claim.

The Estate seeks recovery under the equitable doctrine of unjust enrichment. *Appellant's Brief* at 15. The Magistrate Court rejected the Estate's unjust enrichment claim concluding that the unjust enrichment claim is in the nature of torts, thus abated by Mr. Cornell's death. *Memorandum Opinion re: Kareen Cornell* at 15-16.

“Unjust enrichment, as a fictional promise or obligation implied by law, allows recovery where the defendant has received a benefit from the plaintiff that would be inequitable for the defendant to retain without compensating the plaintiff for the value of the benefit.” *Great Plains Equipment, Inc. v. Northwest Pipeline Corp.*, 123 Idaho 754, 767, 979 P.2d 627, 640 (1999) (citing *Continental Forest Products, Inc. v. Chandler Supply Co.*, 95 Idaho 739, 743, 518 P.2d 1012, 1205 (1974)). Unjust enrichment claims involve claims based on an implicit promise to pay. *Id.*, 979 P.2d at 640.

As with the conversion and constructive trust claim, Appellant cites to no controlling authority to support its assertion the *Bishop* abatement rule does not apply to claims arising in equity. *Appellant’s Brief* at 15. Further, Appellant provides no explanation of how the Magistrate Court erred in its conclusion that “[a]s Kareen’s claims are in the nature of torts, Kareen’s claims are abated by John’s death.” *Memorandum Opinion re: Kareen Cornell* at 16.

For these reasons, no reversible error has been shown, and the Magistrate Court’s dismissal should be affirmed.

G. The Magistrate Court correctly considered and applied the law in rejecting the Estate’s breach of contract claim.

The Estate argues that the Magistrate Court erred by relying upon *Bishop* “to re-characterize the Estate’s contract claims[.]” *Appellant’s Brief* at 15-16.

The Magistrate Court discussed the Estate’s breach of contract claim as follows:

Kareen argues that her breach of contract claim must be viewed as separate from the breach of fiduciary claim and, as a contract claim, survives John’s death. The Supreme Court in *Bishop* addressed the same claim. In the absence of finding that a higher duty of care is provided for under the Trust agreement than provided under the statute, *Bishop* requires abatement of Kareen’s claim. *Bishop v. Owens*, 152 Idaho at 620, 272 P.3d at 1251. Kareen fails to point out any way in which the Trust instrument imposes any duties upon Toni that are not also imposed by the Probate Code. This Court stands by its more detailed analysis when addressing John’s claims that the Trust instrument gives no higher duty of care

than the duty imposed by the Probate Code. *Memorandum Op.* Feb. 15, 2013 at 6-8.

*Memorandum Opinion re: Kareen Cornell* at 13-14. In the earlier opinion referenced therein, the Magistrate Court discussed the *Bishop* decision to conclude that like *Bishop*, this case is a mixed tort and contract case involving torts arising from a contractual agreement. *Memorandum Opinion* Feb. 15, 2013 at 6. The Magistrate Court further concluded that the duties owed by the trustee to a beneficiary are defined by the Uniform Probate Code and Uniform Principal and Income Act. *Id.* at 7. Violation of these fiduciary duties arising under statute is a tort, not a contract. *Id.*

Specifically, the *Bishop* Court analyzed the interplay of tort and contract theories in the attorney-client context as follows:

[T]he contours of the duties owed by an attorney to his or her client are defined by the Idaho Rules of Professional Conduct. If an attorney and client want to provide for a higher standard of care, they may do so by express language in the contract. Here, the standard of care in the contract is essentially the same as in any attorney-client relationship. Because this claim sounds in tort, it abated upon Patricia Shelton's death.

...

Although the medical malpractice cases on which Owens relies are governed by specific statute, the fact that a proponent labels his or her action as sounding in contract as well as malpractice does not make the underlying action contract. The "theory" of relief sought is not different. A holding to the contrary would create a per se breach of contract action in every legal malpractice action. Legal malpractice has traditionally been treated as the proper claim where an attorney breaches his or her duty, which arises from the attorney-client relationship.

As noted in the previous section, because the contingent fee agreement in this matter contained no express language providing for a higher standard of care, the duty owed by Owens is not defined by the contingent fee agreement. The language in the contingent fee agreement that "attorneys shall represent Client in said manner and do all things necessary, appropriate, or advisable, in regard thereto" is not materially different from the standard applied in the legal malpractice claim. Thus, this action is really a malpractice claim disguised as a contract claim. A person cannot change a tort action into a contract action simply by labeling it as such. *Hayward*, 136 Idaho at 350, 33 P.3d at 824.

*Bishop v. Owens*, 152 Idaho 616, 620-21, 272 P.3d 1247, 1251-52 (2012)).

Here, like in *Bishop*, Appellant's breach of contract claim is really a breach of fiduciary duty claim disguised or labelled as a contract claim. The subject trust contained no provisions providing for a higher standard of care than established in the Uniform Probate Code.

Appellant cites to no authority to support its assertions that "a breach of contract claim is distinct from a breach of fiduciary duty claim." *Appellant's Brief* at 17. Appellant further asserts that "[t]o argue that no contractual claim may lie against the trustee is to is to argue that the terms of the trust document have no substance." *Id.* at 18. The trust document has substance, but it is the same substance as found in statute. As such, the Estate's breach of contract claim abates.

For these reasons, no reversible error has been shown, and the Magistrate Court's dismissal of the Estate's breach of contract claim should be affirmed.

H. The Magistrate Court correctly considered and applied I.C. § 5-327(2)

The Estate argues that the Magistrate Court erred in its interpretation of Idaho Code Section 5-327(2). *Appellant's Brief* at 18-20. The Estate contends that "the court's error was the result of construing the language of the statute in such a rigid manner as to produce an absurd result upon application." *Id.* at 18.

It is important to note that said statutory section was amended in 2010, where the Estate's claims cover a time period relating back to December 15, 2009, which is the death of the last grantor's death. In light of said amendment, a two-part analysis is needed to properly consider the Estate's claims.

Prior to its amendment, which took effect on July 1, 2010, said statute read as follows:

Causes of action arising out of injury to the person or property, or death, caused by the wrongful act or negligence of another, except actions for slander or libel, shall not abate upon the *death of the wrongdoer*, and each injured person or the personal representative of each one meeting death, as above stated, shall have a cause of action against the personal representative of the wrongdoer; provided, however, the punitive damages or exemplary damages shall not be awarded nor penalties adjudged in any such action; provided, however, that the injured person shall not recover judgment except upon some competent, satisfactory evidence corroborating the testimony of said injured person regarding negligence and proximate cause.

I.C. § 5-327 (through July 1, 2010) (emphasis added).



In its prior form, the clear language of the statute reflects that survivability applied only after the death of the wrongdoer, not the death of the injured party as the subsequent amendment addressed. Because the amendment to Idaho Code Section 5-327(2) was not retroactive, said amendment applied only to actions which arose on or after the statute's effective date. *See Bishop*, 152 Idaho at 620, 272 P.3d at 1251. Therefore, the statute in its original form applies from the death of Michael S. Cornell on December 15, 2009 until July 1, 2010. The Estate's predecessor in interest, John Cornell, is the injured party and Toni Johnson the wrongdoer for purposes of this appeal. Because the alleged "injured party" is the decedent as opposed to the "wrongdoer," any claims of John Cornell that may have arisen between December 15, 2009 and July 1, 2010 abated upon his death. No reversible error has been shown, and the Magistrate Court's dismissal as it relates to claims arising prior to July 1, 2010 should be affirmed.

The Estate's parsing of the current statute applies only to its claims that arose on or after July 1, 2010. In its current form, Idaho Code § 5-327(2) states in relevant part as follows:

A cause of action for personal injury or property damage caused by the wrongful act or negligence of another shall not abate upon the death of the injured person from causes not related to the wrongful act or negligence. Provided however, that the damages that may be recovered in such action are expressly limited to those for: (i) medical expenses actually incurred, (ii) other out-of-pocket expenses actually incurred, and (iii) loss of earnings actually suffered, prior to the death of such injured person as a result of the wrongful act or negligence.

The Estate argues that the limitation on recovery for medical expenses, other out-of-pocket expenses, and loss of earnings applies only to personal injury cases, not cases involving property damages. *Appellant's Brief* at 18-20. Said interpretation does not employ the well-recognized principles of statutory interpretation cited to by Appellant. *See Appellant's Brief* at 19 (citing *State v. Schulz*, 151 Idaho 863, 866, 264 P.3d 970, 973 (2011); *Smith v. Dept. of Employment*, 100 Idaho 520, 522, 602 P.2d 18, 20 (1979)). Specifically, Appellant cites to no legislative history that would support her conclusion. Appellant parses the second sentence of said statute in an attempt to limit the statute's application to personal injury cases, thereby ignoring the context of the entire document, which is clearly applicable to "a cause of action for personal

injury or property damage.” (emphasis added). Appellant’s interpretation relies upon speculation and generalities (specifically that “medical expenses” rarely, in his opinion, are incurred in property damage cases), in order to deviate from the plain and ordinary meaning of “such action.” Further, said limited interpretation, which rejects its application to property damages cases despite their specific inclusion by reference, departs from common sense and reading. The Estate cites to no case law supporting this interpretation of the statute. For these reasons, no reversible error has been shown and the Magistrate Court’s application of Idaho Code 5-327(2) should be affirmed.

### III. CONCLUSION

For these reasons, Respondent respectfully requests that this Court affirm the *Judgment for Dismissal* and *Memorandum Opinion re: Kareen Cornell*, both entered June 21, 2013, and the Memorandum Opinion re: Remand Order entered June 16, 2014.

DATED this 4 day of August, 2014.

**JONES, BROWER & CALLERY, P.L.L.C.**



KARIN SEUBERT

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing *RESPONDENT’S BRIEF* were, this 5 day of August, 2014, hand-delivered to:

Samuel T. Creason  
Creason, Moore, Dokken & Geidl, P.L.L.C.  
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Lewiston, ID 83501



KARIN SEUBERT

FILED

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CLEARWATER COUNTY

2014 AUG 12 PM 12:52

CASE NO. W2012-277

BY BD DEPUTY

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER**

In the Matter of:

)  
) Case No. CV 2012-00277  
)  
)  
)  
)  
)  
)  
)

THE REVOCABLE FAMILY TRUST  
OF MICHAEL S. CORNELL AND  
ARLIE M. CORNELL.

**APPELLANT'S REPLY BRIEF**

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Appeal from the Magistrate Division of the District Court  
of the Second Judicial District for Clearwater County

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Honorable Randall W. Robinson, Magistrate Judge Presiding

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## PRELIMINARY STATEMENT<sup>1</sup>

This Court must determine whether, through the doctrine of abatement, Toni C. Johnson can avoid repayment of her brother's estate, the Estate of John Cornell, for property losses from admittedly improper conduct.

Johnson's arguments regarding common law abatement are based upon an expansive interpretation of a single sentence in *Bishop v. Owens*, 152 Idaho 616, 619 (2012). Johnson proposes an interpretation which would dictate that all claims which are torts—or which could be re-characterized as torts—abate upon the death of the injured party, absent a statutory exception. Johnson's interpretation conflicts with pre-*Bishop* and post-*Bishop* precedent, as well as the language and facts from *Bishop*, itself. The Court should reject Johnson's proposed interpretation of *Bishop*. Without Johnson's proposed universal rule of abatement, the Court must determine whether the Estate's claims fall within one of the exceptions to the general rule that tort claims abate. The Estate's claims fall within three such exceptions: the exception for claims seeking redress for injury to property; the exception for claims founded upon a remedial statute; and the exception for claims that are not legal claims, but claims in equity.

Johnson's argument regarding the Estate's breach of contract claims proposes a legal analysis whereby the court must re-characterize every breach of contract claim into a tort claim if the contract does not provide for a higher standard of care than established at law. Johnson's

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<sup>1</sup> Petitioner sets forth a verbatim copy of her brief filed in the previous appeal of this matter, any substantive change in text has been underlined.

analysis should be rejected, as it would create an unsubstantiated and unworkable standard which would, in practical effect, eliminate nearly all breach of contract claims.

Finally, Johnson's argument regarding statutory abatement under Idaho Code § 5-327(2) sets forth a proposed interpretation which conflicts with the intent of the legislature, as determined by the language of the statute, common sense, and reason.

The Estate requests that this honorable Court reverse the judgment of the magistrate court.

## ARGUMENT

### A. The Estate's Tort Claims Did Not Abate at Common Law.

Johnson argues that *Bishop* established the following universal statements as a rule of law: *All claims which can be characterized as a tort claim abate at common law unless a statutory exception exists. See Resp. Br. 4, ¶2.* Johnson's proposed rule of abatement would prohibit the Estate from pursuing its claims against her for the property she wrongfully withheld from her brother. Johnson's interpretation stretches *Bishop* far beyond the scope of its facts and far beyond the Idaho Supreme Court's treatment of *Bishop* earlier this year in *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 293 P.3d 661 (2013). In *Luciani*, the Court made clear that *Bishop* did not establish a universal statement of law, but rather re-iterated what had long been the rule at common law in Idaho: exceptions exist to the *general rule* that tort claims abate. *See id.* at 42, 293 P.3d at 667.

The *Bishop* Opinion included a statement that "[u]nder the common law, claims arising out of contracts generally survive the death of the claimant, while those sounding in pure tort

abate.” 152 Idaho 616, 619, 272 P.3d 1247, 1250 (2012). As set forth in the Estate’s Opening Brief, Johnson’s interpretation of this sentence is erroneous. *See App. Br.*, 7-9. Johnson’s interpretation conflicts with (a) the language of the *Bishop* Opinion; (b) the *Bishop* Court’s citation to *Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919) as authority; and (c) the post-*Bishop* authority of *Luciani*.

The question before the *Luciani* Court was whether a legal malpractice claim could be assigned as part of an asset and liability transfer from one entity to another. *Luciani*, 154 Idaho at 39, 293 P.3d at 663. The Court’s consideration of assignability included a discussion of its precedent on survival in *Bishop*. *Id.* The issue of survival was raised by the defendants in *Luciani*, likely because “[t]he assignability of a cause of action is . . . intimately associated with, and in most cases held to depend upon, the same principle as the survival of a cause of action. Thus, if it survives, it may be assigned; if not, it may not.” *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254, 257 (1926). The *Luciani* defendants argued that *Bishop* stood for the proposition that all legal malpractice claims abated at common law—just as Johnson argues here—and, therefore, that such claims are unassignable. *Luciani*, 54 Idaho at 43, 293 P.3d at 667. The Court rejected this reasoning.

The Supreme Court first made clear that *Bishop* did not stand for the proposition that all legal malpractice claims sounded in pure tort. *Id.* The Court then made clear that *Bishop* did not stand for the proposition that every tort claim abated at common law.

The malpractice claim here sounds in tort and, therefore, the *MacLeod* case provides some guidance. Although we stated that “if [a tort claim] survives, it may be assigned; if not, it may not,” we also held that an “injury [that] lessens the



estate of the injured party does survive, and that it is assignable.” 43 Idaho at 75, 249 P. at 257. If personal injury claims that “diminish the estate [and are] an injury to property” may be assigned, it seems clear that personal injuries of the type alleged here—malpractice leading to an alleged loss of millions of dollars—are precisely that. *See id.* The crux of St. Luke’s lawsuit against Luciani is that the alleged malpractice substantially impacted the value of the assets it acquired from Magic Valley.

*Id.* (quoting *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254, 257 (1926)) (alterations in original). Thus, the *MacLeod* Opinion is still good law in this jurisdiction with respect to the intimately associated issues of assignability and survival.

Having established that the *Bishop* Opinion did not create a universal rule of abatement, the question before this Court is whether the Estate’s claims fall within any of the “well-recognized exceptions” to the general rule that tort claims abate. *See Kloepper*, 32 Idaho 415, 184 P. 477. The Estate’s Opening Brief shows that its claims fall within three well-recognized exceptions: (1) the exception for claims seeking redress for injury to property, *see App. Br.* 9-11; (2) the exception for claims founded upon a remedial statute, *see App. Br.* 11; and (3) the exception for claims that are not legal claims, but claims in equity, *see App. Br.* 12-14.

(1) Tort claims seeking redress for injury to property are an exception to the general rule of abatement.

The exception to abatement for claims seeking redress for injury to property is an expressly identified exception in *Luciani*. 54 Idaho at 43, 293 P.3d at 667 (“[an] injury that lessens the estate of the injured party does survive”). In her brief, Johnson does not provide analysis of the *Luciani* Opinion; instead, she argues that two other cited cases are inapposite. *See Resp. Br.* 6 (disputing applicability of *Barnes v. Barnes*, 135 Idaho 103, 105, 15 P.3d 816, 818

(2000) & *First Sec. Bank of Idaho, Nat. Ass'n v. Rogers*, 91 Idaho 654, 657, 429 P.2d 386, 389 (1967)).

The Estate directs this Court to *Barnes* as merely one example of Idaho courts' treatment of a decedent's claims regarding property interests upon the decedent's death. Those claims do not abate. The Estate directs this Court to *Rogers* as authority for the finding that, at the very least, a genuine issue of material fact exists regarding whether John Cornell held a vested property interest in the Trust res at the time of his death. By conceding inequitable conduct, Johnson has conceded that John Cornell held an interest at the date of death; she merely argues that her inequitable conduct succeeded in divesting him of that interest. Thus, Johnson has conceded those facts necessary for the Estate to pursue its claim at trial.

The cases of *Barnes* and *Rogers* provide exemplary support for that which is explicitly stated in *Luciani*, *MacLeod*, and *Kloepfer*: an estate may pursue the claims of the decedent seeking redress for injury to property.

(2) Tort claims seeking redress based upon a remedial statute are an exception to the general rule of abatement.

Johnson's argument regarding this exception presumes that *Bishop* established a universal rule against survivability. Johnson then proposes an analysis whereby the Court must find abatement absent the provision of Idaho case law directly overcoming that universal rule. As set forth in the Estate's briefing, *Bishop* provides no such universal rule. Where no controlling authority exists, Idaho courts look to other jurisdictions and sources in determining

whether an exception should be recognized in Idaho.<sup>2</sup> The second edition of American Jurisprudence sets forth the general rules of law for United States' jurisdictions based upon a comprehensive review of case law. In fact, this same treatise was relied upon by the Idaho Supreme Court in *Luciani*. 154 Idaho at 41 & 42, 293 P.3d at 665 & 666. The Estate supported its reliance upon the second edition of American Jurisprudence by pointing out that the remedial statutes of Idaho Code §§ 15-7-306 & 15-3-808 focus upon the injury to the Estate or trust res in determining the liability of a personal representative or trustee. Thus, the statutory guidance on these remedial statutes is consistent with the reasoning set forth in the Estate's Opening Brief. In response, Johnson again argues that this Court must disregard such guidance and find abatement, absent an express statement by the Supreme Court overturning *Bishop*. Johnson's argument fails because she presupposes the accuracy of her interpretation of *Bishop* before considering the statutes, instead of allowing these authorities to guide the interpretation of *Bishop*. Where Johnson's proposed interpretation conflicts with nearly every other area of legal guidance, the Court should find that the proposed interpretation fails, rather than finding that it somehow constitutes a sea change to the state of the law. The Estate maintains that the magistrate court's analysis was in error for the reasons set forth in the Estate's Opening brief.

(3) Tort claims based in equity and not in law do not abate.

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<sup>2</sup> See *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani*, 154 Idaho 37, 293 P.3d 661 (2013) (looking to California, Nebraska, Indiana, Kansas, Virginia, Arizona, Florida, Illinois, Michigan, Minnesota, Rhode Island, Pennsylvania, Maine, ALR, and Am.Jur.2d); *MacLeod v. Stelle*, 43 Idaho 64, 249 P. 254, 255 (1926) (looking to California, New York, Wisconsin, Ohio, Kansas, Montana, Connecticut, Alabama, Colorado, and multiple secondary sources); *Kloepfer v. Forch*, 32 Idaho 415, 184 P. 477 (1919) (looking to Virginia, Connecticut, Massachusetts, New York, Indiana, California, and *Corpus Juris*).

With respect to the Estate's equitable claims, Johnson once again argues that this Court must find that the Estate's claims abated absent controlling case law expressly providing for an exception to the general rule in *Bishop*. This type of analysis runs contrary to the Idaho Supreme Court's consideration of other jurisdictions and authorities when analyzing issues of assignment and survival.<sup>3</sup> With respect to the Estate's arguments regarding the re-characterization of its equitable claims as legal claims, Johnson provides no argument or analysis additional to that set forth by the magistrate court. The Estate maintains that the magistrate court's analysis was in error for the reasons set forth in the Estate's Opening brief.

**B. The Estate's Complaint States Separate Contract Claims.**

Johnson proposes an interpretation of *Bishop* that not only created a universal rule of abatement, but that also dictates that all other claims—whether in tort or contract, whether in law or equity—ought to be re-characterized and held abated. The magistrate court erred in its interpretation. In its Opening Brief, the Estate distinguished its contract claims from those found in *Bishop* by setting forth the distinct factual scenarios, and identifying specific trust provisions that required certain duties not identified in the Uniform Probate Code. Johnson argues that even though the Estate has identified specific terms, it has still only made a tort claim because “no

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<sup>3</sup> Johnson challenges the Estate's citation to *Brasch v. Brasch*, 55 Idaho 777, 47 P.2d 676 (1935) as appearing to presume survival. The Estate provided this citation as a supplement to the general rule of survival of equitable claims, as set forth in the second edition of American Jurisprudence. The Estate still maintains that the *Brasch* Court appears to presume survival. In *Brasch*, the Court considered whether an estate could pursue a constructive trust claim on behalf of a decedent. *Id.* The *Brasch* Court held that the estate could not pursue the claims because the statute of limitations ran prior to institution of the suit. *Id.* The Court made no mention of abatement.

though the Estate has identified specific terms, it has still only made a tort claim because “no provisions [of the trust] provid[e] for a higher standard of care than established in the Uniform Probate Code.” *Resp. Br.* 12, ¶1.

Johnson reasons that where (1) the law presumes a standard of care, (2) the contract does not provide a distinct standard of care, and (3) the cause of action alleges a breach of that standard of care, then the claim is made in tort and not contract. If Johnson’s proposed reasoning were to prevail, a contract cause of action would rarely exist. The law presumes a standard of care in every contract, whether it be a standard of good faith and fair dealing or a higher standard based upon the relationship of the parties. Johnson’s attempt to distinguish contract claims from tort claims based upon the document’s identification of a unique standard of care is unsubstantiated and unworkable.

**C. The Estate’s Causes of Action Did Not Abate Under Idaho Code § 5-327(2).**

The Estate was unable to identify Idaho case law addressing the application of the language of Idaho Code § 5-327(2) to claims of property damage. The Estate recognizes that the legislature’s choice of arrangement and wording is inarticulate. The Court is left with the task of deriving the intent of the legislature. In accomplishing its task, the Court must determine if common sense and reason counsel a finding that the legislature intended to limit property damage cases to recovery for “medical expenses,” “other out-of-pocket expenses” and “loss of earnings actually suffered” where those damages are incurred “prior to the death of such injured period as a result of the wrongful act or negligence.” For the reasons set forth in the Estate’s

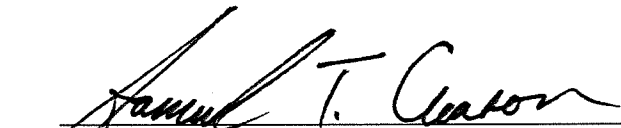
Opening brief, the Estate maintains that the legislature did not intend the second sentence to function as a limitation on property damage claims.

### CONCLUSION

The property interests of a decedent survive the decedent, they do not die and they do not abate. The magistrate court erred in its expansive reading of *Bishop* and erred in its rigid interpretation of Idaho Code § 5-327(2). The Estate asks this Court to reverse the grant of summary judgment.

DATED this 11th day of August, 2014.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
\_\_\_\_\_  
Samuel T. Creason, ISB #8183  
Attorneys for Appellant

**CERTIFICATE OF SERVICE**

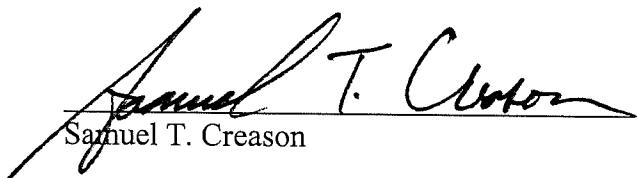
The undersigned does hereby certify that two copies of the foregoing REPLY BRIEF were served by the method indicated below and addressed to the following:

Karin Seubert  
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  x    
\_\_\_\_\_  
\_\_\_\_\_  
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FIRST-CLASS MAIL  
HAND DELIVERED  
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FAX TRANSMISSION

DATED this 11th day of August, 2014.

  
\_\_\_\_\_  
Samuel T. Creason

SECOND JUDICIAL DISTRICT COURT, STATE OF IDAHO  
IN AND FOR THE COUNTY OF CLEARWATER  
150 MICHIGAN AVE  
CROFINO, IDAHO 83544

FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

In The Matter Of

Michael S. Cornell, etal.

)  
) Case No: CV-2012-0000277  
) CASE NO. CV 2012-277  
) NOTICE OF HEARING  
) BY BP DEPUTY

NOTICE IS HEREBY GIVEN that the above-entitled case is hereby set for:

Oral Argument on Appeal – Continued Tuesday, September 23, 2014 10:30 AM  
Judge: Michael J. Griffin  
Courtroom: District Courtroom

I hereby certify that the foregoing is a true and correct copy of this Notice of Hearing entered by the Court and on file in this office. I further certify that copies of this Notice were served as follows on August 21st, 2014.

KARIN SEUBERT  
P.O. BOX 854  
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☒ Mailed ☐ Hand Delivered ☐ Faxed

THEODORE O. CREASON  
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☒ Mailed ☐ Hand Delivered ☐ Faxed

Dated: August 21st, 2014  
Carrie Bird  
Clerk Of The District Court

By: Bali Dero  
Deputy Clerk

DOC22cv 7/96



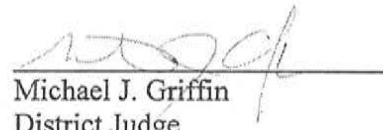
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CLEARWATER COUNTY  
2014 SEP 11 PM 4:53  
CASE NO. CV 2012-277  
BY *GF* DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF:	)	CASE NO. CV 2012-277
	)	
THE REVOCABLE FAMILY TRUST OF	)	ORDER STAYING APPEAL
MICHAEL S. CORNELL AND ARLIE	)	
M. CORNELL.	)	

This appeal in this matter is stayed pending the filing of a final judgment pursuant to IRCP 54(a).

Dated this 11 day of September, 2014.

  
\_\_\_\_\_  
Michael J. Griffin  
District Judge

# CERTIFICATE OF MAILING

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that a copy of the foregoing was mailed to, faxed to, or delivered by me on the 11<sup>th</sup> day of September, 20 14, to:

Darrel Aherin  
Aherin, Rice & Anegon  
P.O. Drawer 698  
Lewiston, ID 83501

✓ U.S. Mail

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

✓ U.S. Mail

Theodore O. Creason  
Creason, Moore, Dokken & Geidl, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501

✓ U.S. Mail



Carrie Bird, Clerk of Court

By: C. Hering  
Deputy Clerk

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 SEP 22 PM 4:10

CV 2012-277

IN THE DISTRICT COURT FOR THE SECOND JUDICIAL DISTRICT  
FOR THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER  
MAGISTRATE DIVISION

IN THE MATTER OF THE

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL

Case No. CV 2012-277

JUDGMENT

JUDGMENT IS ENTERED AS FOLLOWS:

The Motion to Dismiss filed by Toni C. Johnson of the Petition for Supervised Administration and Court Ordered Distribution filed by Kareen Cornell, converted into a Motion for Summary Judgment by the filing of Affidavits, IS HEREBY GRANTED and the Petition for Supervised Administration and Court Ordered Distribution is HEREBY DISMISSED.

Dated this 22 day of September, 2014.



Randall W Robinson, Magistrate

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Judgment of Dismissal was mailed postage pre-paid, on the 22<sup>nd</sup> day of September, 2014, to:

Samuel Creason  
Creason, Moore, Dokken & Geidl  
P.O. Drawer 835  
Lewiston, ID 83501

*Faxed*

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

*Faxed*

CARRIE BIRD  
Clerk of the District Court

By: Bali Day  
Deputy Clerk



JUDGMENT-2

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

COURT MINUTES

Presiding Judge  
MICHAEL J. GRIFFIN  
Reporter  
Keith Evans  
Date: 10-15-14  
Time: 11:30 a.m.

IN THE MATTER OF  
MICHAEL S. CORNELL, et al.,

)  
)  
) Docket No. CV12-000277  
)  
) APPEARANCES:  
) Karin Seubert  
) Sam Creason

SUBJECT OF PROCEEDINGS: ORAL ARGUMENT  
COURTROOM #3

BE IT KNOWN, THAT THE FOLLOWING PROCEEDINGS WERE HAD, TO-WIT

113010 Ms. Seubert and Mr. Creason present.  
113025 Mr. Creason presents argument.  
113229 Ms. Seubert presents argument.  
113508 Mr. Creason responds.  
113621 Court addresses counsel and will take matter under advisement and will  
issue written decision.  
113636 Court recess.

TERESA DAMMON

Deputy Clerk  
1 Page of 1 Pages

COURT MINUTES OCTOBER 15, 2014

APPROVED:

\_\_\_\_\_  
Presiding Judge



Oct. 24. 2014 1:07PM

No. 6063 FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 OCT 24 PM 1:50

CASE NO. CV 2012-277

BY CF DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF:

CASE NO. CV 2012-277

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE  
M. CORNELL.

MEMORANDUM OPINION

BACKGROUND

Michael S. Cornell and Arlie M. Cornell, husband and wife, created a trust (Cornell Family Trust) while living in California. They had two children, John Cornell and Toni Johnson, both of whom survived their parents.

Arlie and Michael Cornell were originally co-trustees of their family trust. Arlie Cornell died on November 9, 2008.

On August 6, 2009 Michael Cornell amended the trust and Toni Johnson was appointed sole trustee.

Michael Cornell died on December 15, 2009.

The trust provided that the trustee would divide the trust property equally between Toni Johnson and John Cornell as soon as reasonably possible after the death of both trustors. Toni Johnson did not distribute any of the trust property to John Cornell. Toni Johnson used the trust property for her own benefit.

John Cornell filed a Petition for Supervised Administration of the Cornell family trust, and removal of Toni Johnson as trustee on July 11, 2012.

MEMORANDUM OPINION-1

SCANNED

762

11/7/2014

John Cornell committed suicide on August 20, 2012.

The trust provided that if one of the beneficiaries died before receiving their share of the trust assets, then their share would be distributed to the deceased beneficiaries' issue, and if there was no issue, then to the surviving beneficiary.

Kareen Cornell, wife of John Cornell, was appointed personal representative of John Cornell's estate on February 6, 2013.

Kareen Cornell also requested that Toni Johnson be removed as trustee and the administration of the trust be supervised.

Affidavits were filed and the Magistrate treated the motion as one for summary judgment. The Magistrate's opinion was issued on February 15, 2013. That order dismissed John Cornell's petition for supervised administration of the Cornell family trust and petition for removal of Toni Johnson as trustee.

The Magistrate issued a summary judgment dismissing Kareen Cornell's petition on June 21, 2013.

The Magistrate determined that any claims of John Cornell to the property of the trust were abated upon his death. The Magistrate did not set forth reasons for not removing Toni Johnson as trustee.

The matter was remanded for findings regarding not removing Toni Johnson as trustee. The Magistrate used his discretion in not removing Toni Johnson as trustee, even though she breached her fiduciary duties as trustee, because under the terms of the trust she would receive all of the property after John Cornell died.

Kareen Cornell appeals the Magistrate's order of June 16, 2014.

#### APPELLATE ISSUES

Did the Magistrate err in determining that Toni Johnson's breach of fiduciary duty to John Cornell was a tort which abated upon his death?

#### LEGAL STANDARD

The court defers to the trial court's findings of fact if supported by substantial competent evidence, but exercises free review of the law and its application to the facts.

### DISCUSSION

Paragraph 4.03 of the Cornell Family Trust provides that upon the death of the surviving trustor, the trustee shall, as soon as reasonably possible, divide the net assets of the trust into two equal shares, one for Toni Johnson, and the other for John Cornell. Toni Johnson had a fiduciary duty established by the trust and I.C. 15-7-301 to expeditiously distribute the net assets of the estate. Toni Johnson breached her fiduciary duty.

Paragraph 4.03(a) of the trust document provides that if a beneficiary of the trust dies before their share is distributed, then that share would be distributed to the deceased beneficiaries' issue, and if no issue, then to the surviving beneficiary.

John Cornell had no issue.

By not distributing John Cornell's share of the trust estate to him for almost 3 years Toni Johnson reaped the benefit of not performing her fiduciary duties.

There was no evidence presented of a contract between John Cornell and Toni Johnson.


### CONCLUSION

The Magistrate correctly classified John Cornell's cause of action as one in tort not contract. The Magistrate also correctly determined that a cause of action in tort abates under common law upon the death of the claimant. The Magistrate also correctly determined that the legislature has not provided any statutory exception to this abatement.

The Magistrate did not abuse his discretion when he did not remove Toni Johnson as trustee for breach of her fiduciary duties.

The Magistrate's order dismissing John Cornell's, and later Kareen Cornell's, petitions to remove Toni Johnson as trustee of the Cornell Family Trust, and petitions for supervised administration of the trust should be affirmed.

Dated this 27 day of October, 2014.

  
\_\_\_\_\_  
Michael J. Griffin  
District Judge



CERTIFICATE OF MAILING

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that a copy of the foregoing was mailed to, faxed to, or delivered by me on the 24<sup>th</sup> day of October, 20 14, to:

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

☒ U.S. Mail

Samuel Creason  
Creason, Moore, Dokken & Geidl, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501

☒ U.S. Mail



Carrie Bird, Clerk of Court

By: C. Gering  
Deputy Clerk

Oct. 24. 2014 1:07PM

No. 6063

P. 4

FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 OCT 24 PM 1:50

CASE NO.

CV 2012-277

BY

*Ch*

DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

IN THE MATTER OF:


)  
) CASE NO. CV 2012-277  
)

THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE )  
M. CORNELL. )

) ORDER RE: APPEAL  
)

The Magistrate's Order of June 16, 2014 is affirmed.

Dated this 24 day of October, 2014.

  
Michael J. Griffin  
District Judge

SCANNED

11/7/2014 766

### CERTIFICATE OF MAILING

I, the undersigned Deputy Clerk of the above entitled Court, do hereby certify that a copy of the foregoing was mailed to, faxed to, or delivered by me on the 24<sup>th</sup> day of October, 2014, to:

Karin Seubert  
Jones, Brower, and Callery, P.L.L.C.  
P.O. Box 854  
Lewiston, ID 83501

☒ U.S. Mail

Samuel Creason  
Creason, Moore, Dokken & Geidl, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501

☒ U.S. Mail



Carrie Bird, Clerk of Court

By: C. Hering  
Deputy Clerk

FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2014 DEC -2 AM 11:46

CASE NO. CV12-277

BY BP DEPUTY

Samuel T. Creason, ISBN: 8183  
Theodore O. Creason, ISBN: 1563  
CREASON, MOORE, DOKKEN & GEIDL, PLLC  
1219 Idaho Street  
P.O. Drawer 835  
Lewiston, ID 83501  
Telephone: (208) 743-1516  
Facsimile: (208) 746-2231  
Attorneys for Personal Representative  
of Estate of John Henry Cornell

**IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR CLEARWATER COUNTY**

In the Matter of:

THE REVOCABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE M.  
CORNELL.

)  
) Supreme Court No. \_\_\_\_\_  
) District Court No. CV-12-0277  
)  
) **NOTICE OF APPEAL**  
)  
) I.R.C.P. 83  
) Fee Category: L(4)  
) Filing Fee: \$129.00  
)  
)

TO: THE RESPONDENT, TONI C. JOHNSON, AND THE PARTY'S ATTORNEYS,  
KARIN SEUBERT OF JONES, BROWER, & CALLERY, P.L.L.C., 1304 IDAHO  
STREET, POST OFFICE BOX 854, LEWISTON, IDAHO 83501, E-MAIL:  
KRSEUBERT@LEWISTON.COM,

AND

THE CLERK OF THE ABOVE-ENTITLED COURT.

NOTICE IS HEREBY GIVEN THAT:

1. The Appellant, The Estate of John Henry Cornell, acting through its personal  
representative, Kareen Cornell, (hereinafter the "Estate") appeals against the above named

Respondent to the Idaho Supreme Court from the Memorandum Opinion and Order re: Appeal entered in the above entitled action on the 24th day of October, 2014, Honorable Judge Michael J. Griffin presiding, which affirmed the Magistrate Court's September 22, 2014, Judgment.

2. That Appellant has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above are appealable orders under and pursuant to Idaho Appellate Rule 11(a)(2).

3. The statement of issues on appeal that the Estate intends to assert is as follows:

**Issue 1.** Whether the Court erred in finding that any claims to the Trust res by, through, or on behalf of John Henry Cornell abated upon the death of John Henry Cornell?

**Issue 2.** Such other issues that may later be raised by Appellant.

4. An Order has not been entered sealing all or any portion of the record.

5. A reporter's transcript has not been requested.

6. The Appellant requests no additional documents to be included in the clerk's record in addition to those automatically included under Idaho Appellate Rule 28.

7. The Appellant requests no additional documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court.

8. I certify:

a. That a copy of this Notice of Appeal has been served on each reporter of the trial or proceeding, though no transcript has been requested, as named below at the address set out as follows:

Keith Evans  
K&K Reporting  
P.O. Box 574  
Lewiston, Idaho 83539

b. That the Appellant is exempt from paying the estimated transcript fee because no transcript was ordered.

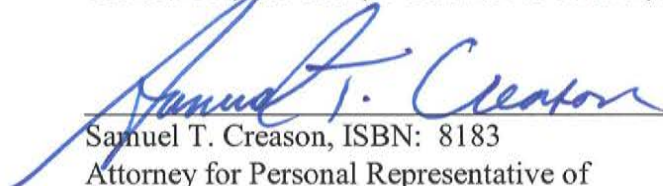
c. That the estimated fee for fee for preparation of the clerk's record has been paid.

d. That the appellate filing fee has been paid.

e. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 1 day of December, 2014.

CREASON, MOORE, DOKKEN & GEIDL, PLLC

  
Samuel T. Creason, ISBN: 8183  
Attorney for Personal Representative of  
Estate of John Henry Cornell

**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on this 1 day of December, 2014, a copy of the foregoing NOTICE OF APPEAL was served by the method indicated below, and addressed to the following:

Karin Seubert  
Jones, Brower, & Callery, P.L.L.C.  
1304 Idaho Street  
P.O. Box 854  
Lewiston, Idaho 83501

  K   FIRST-CLASS MAIL  
      HAND DELIVERED  
      OVERNIGHT MAIL  
      FAX TRANSMISSION (208) 746-9553  
      EMAIL *krseubert@lewiston.com*

  
Samuel T. Creason, ISBN: 8183

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT  
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of:

THE RECOVERABLE FAMILY TRUST OF  
MICHAEL S. CORNELL AND ARLIE  
M. CORNELL.

CASE NO. CV2012-277

CLERK'S CERTIFICATE OF APPEAL

APPEAL FROM SECOND JUDICIAL DISTRICT, CLEARWATER COUNTY

THE HONORABLE MICHAEL J. GRIFFIN, PRESIDING

Case number from district court:	CV2012-227
Order or judgment appealed from:	Memorandum Opinion and Order RE: Appeal, , filed 10/24/14.
Attorney for Appellant:	Samuel T. Creason, P.O. Drawer 835, Lewiston, Idaho 83501
Attorney for Respondent:	Karin Seubert, P.O. Box 854, Lewiston, Idaho 83501
Appealed by:	The Estate of John Henry Cornell, acting through its personal representative, Kareen Cornell
Appealed against:	Toni C. Johnson
Notice of Appeal Filed:	December 2, 2014
Appellate fee paid:	Yes
Respondent's Request for additional Record filed:	None
Was District Court Reporter's Transcript requested?	No
If so, name of Reporter:	N/A

Dated this 3<sup>rd</sup> day of December, 2014.

CARRIE BIRD  
Clerk of the District Court



By Barbri Dery  
Deputy Clerk

CLERK'S CERTIFICATE  
OF APPEAL



FILED  
CLERK OF DISTRICT COURT  
CLEARWATER COUNTY  
2015 FEB -3 AM 11:10  
CASE NO. CV2012-277  
BP

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE  
STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

In the Matter of: ) CV2012-277  
)  
THE REVOCABLE FAMILY TRUST OF ) SUPREME COURT NO. 42822  
MICHAEL S. CORNELL AND ARLIE M. )  
CORNELL. ) CLERK'S CERTIFICATE  
) OF EXHIBITS  
)  
\_\_\_\_\_ )

I, Barbie Deyo, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify:

That the attached list of exhibits is a true and accurate copy of the exhibits being forwarded to the Supreme Court on Appeal.

I FURTHER CERTIFY, that the following documents will be submitted as EXHIBITS to the Record:

1. Transcript of a Motion To Dismiss Hearing held June 4, 2013, filed August 2, 2013.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Orofino, Idaho this 3rd day of February, 2015.

CARRIE BIRD  
Clerk of the District Court  
BY: Barbie Deyo  
Deputy Clerk



FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

CASE NO. CV2012-277 ✓

In the Matter of:	)	CV2012-277 <u>BP</u> DEPUTY
	)	
THE REVOCABLE FAMILY TRUST OF	)	SUPREME COURT NO. 42822
MICHAEL S. CORNELL AND ARLIE M.	)	
CORNELL.	)	CERTIFICATE TO RECORD
	)	
	)	

I, Barbie Deyo, Deputy Clerk of the District Court of the Second Judicial District of the State of Idaho, in and for the County of Clearwater, do hereby certify that the above foregoing record in the above-entitled cause was compiled and bound under my direction as, and is a true and correct record of the pleadings and documents that are automatically required under Rule 28 of the Idaho Appellate Rules, as well as those requested by Counsels.

I FURTHER CERTIFY, that the Notice of Appeal was filed in the District Court on the 2nd day of December, 2014.

CARRIE BIRD, Clerk

By Barbie Deyo  
Deputy Clerk



CERTIFICATE TO RECORD

FILED

CLERK OF DISTRICT COURT  
CLEARWATER COUNTY

2015 FEB 20 AM 8:01

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CLEARWATER

BY BD DEPUTY

In the Matter of: )  
 ) SUPREME COURT NO. 42822  
THE REVOCABLE FAMILY TRUST OF )  
MICHAEL S. CORNELL AND ARLIE )  
M. CORNELL. ) CERTIFICATE OF SERVICE  
 )  
Petitioner-Appellant, )  
 )

I, Barbie Deyo, Deputy Clerk of the District Court of the  
Second Judicial District of the State of Idaho, in and for the  
County of Clearwater, do hereby certify that copies of the  
Clerk's Record were placed in the United States mail and  
addressed to Samuel T. Creason, Creason, Moore, Dokken & Geidl,  
PLLC, P.O. Drawer 835, Lewiston, Idaho 83501 and Karin Seubert,  
Jones, Brower & Callery, PLLC, P.O. Box 854, Lewiston, Idaho  
83501 this 20<sup>th</sup> day of February, 2015.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed  
the seal of the said Court this 20<sup>th</sup> day of February, 2015.

CARRIE BIRD, Clerk

By Barbie Deyo  
Deputy

